

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA
AT
NEW ORLEANS.

NOVEMBER, 1881.

JUDGES OF THE COURT:

HON. EDWARD BERMUDEZ, <i>Chief Justice</i> ;		
HON. F. P. POCHÉ,	}	<i>Associate Justices.</i>
HON. R. B. TODD,		
HON. WM. M. LEVY,		
HON. C. E. FENNER,		

No. 7244.

BENITO VINAS VS. THE MERCHANTS' MUTUAL INSURANCE COMPANY.

A party may allege fraud in his pleadings, in a civil suit, for the purposes of his case, without thereby rendering himself liable in damages for slander, when he has made the charge in good faith, without malice and under a state of things from which the fraud could reasonably be inferred. The authorities on this point reviewed.

A PPEAL from the Fifth District Court, parish of Orleans. *Rogers, J.*

George L. Bright for Plaintiff and Appellant:

We submit we have shown :

First—That an Insurance Company who charges a claimant with fraud when he seeks to recover a loss upon a policy is liable in damages for slander and libel.

Second—That all the facts recited in the petition are proved.

Third—That the wrong done the plaintiff is aggravated by the fact that the Insurance Company procured a notorious vagabond, unworthy of belief, to substantiate the false charge they had made.

Albert Voorhies for Defendant and Appellee :

First—This being an action for malicious prosecution, plaintiff must allege and prove—first, the falsity of the charge;—secondly, malice on part of defendant,—and, thirdly, want of probable cause.

Second—Plaintiff has not alleged want of probable cause, and has failed to prove either the above three requisites.

Vinas vs. Merchants' Mutual Insurance Company.

- Third—The judgment in the original suit is not *res judicata* in the subsequent suit for malicious prosecution, since the demand is not the same, nor is the cause of action the same.
- Fourth—A corporation is responsible for damages, caused by its agents in the discharge of their duties; but it cannot commit a crime or offence: its officers, who have done so, are personally responsible *civiliter*.
- Fifth—The overruling of an exception that a corporation cannot be sued for damages *ex delicto*, does not determine that plaintiff has a cause of action; but the whole case comes up upon the merits.
- Sixth—A defendant cannot be made liable for averments pertinent to the issue in defense of a suit against them. This is a privileged communication under the policy of the law.
- Seventh—Fraudulent over-valuation proven by showing that the property was worth less than half the valued insurance, and the insured attempting to pass as new old and second-hand boilers.
- Eighth—To impeach a witness, the proper question is whether, from his reputation for truth and veracity, he is to be believed on oath. The answer that, from his reputation generally, or from knowledge of his character, he cannot be believed under oath,—is essentially defective and inadmissible.
- Ninth—Under the general issue, on a suit of damages for malicious prosecution, the truth of the charge is at issue.
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The opinion of the Court was delivered by

BERMUDEZ, C. J. The plaintiff claims of the defendant \$20,000 damages for libel and defamation of character.

He alleges that he insured with the defendants two steam boilers of the value of \$3500, and that, when he claimed the loss, the defendants charged him with *fraud*, with an attempt to defraud them, and that they procured a false witness, wholly and notoriously unworthy of belief, to defame him and establish their false defense.

The suit was instituted on the 7th of October, 1869. The defendants pleaded no cause of action, in this: that a corporation cannot be made responsible for damages *ex delicto*. The District Court maintained the exception. The Supreme Court reversed the judgment and remanded the case.

Joining issue, the defendants then answered: that the allegations in the answer to the suit which the plaintiff had brought in 1867 against them on the policy of insurance, were made in good faith, and were based upon what they considered to be the truth; that they had good reason to believe the said allegations to be true and still believe them to be true.

The case was tried by a jury who, after a charge, rendered a verdict against plaintiff. Thereupon the court pronounced judgment in favor of the defendants. The plaintiff appeals.

Technically, this is an action for malicious prosecution. If not identical in all its features, it is at least germane to it and resembles it very much.

It is possible that we would have the power of reviewing the judgment of the Court as reported in 27 An. 367, overruling the exception of no cause of action and remanding the case, such judgment being merely

interlocutory and revisable until the determination of the case on its merits, but we deem it unnecessary to exercise that power. It is proper, however, that we should state that we do not consider that the Court then decided that the petition disclosed a cause of action, and that we are of opinion that it only declared that corporations are not protected from civil prosecutions for damages *ex delicto*. We reach this conclusion as the exception was merely: that the facts alleged in the petition (if true, which was, however, not admitted, except for the purpose of the exception), do not constitute a ground of action, as a corporation cannot be made responsible in damages *ex delicto*. The exception did not otherwise assail the sufficiency of the petition, which can be certainly charged after all the evidence has been admitted and the case on appeal.

The defense set up in consequence by the defendant is, not only that the plaintiff has neither alleged nor proved *want of probable cause*, but that the evidence in the record shows: absence of malice, good faith and justification, in setting up the defense raised at the time—under the circumstances then in existence.

We do not consider that it was incumbent on the plaintiff to allege and prove the *falsity* of the charge of *fraud and malice* on the part of the defendant, and *want of probable cause*. It was sufficient for the plaintiff to have proved, as he has, the use of the language charged and it then rested on the defendant to establish exoneration from liability, for some valid reason.

The charge of fraud made by the defendant at the time of the institution of the suit on the policy, was pertinent to the issue and could be asserted with impunity, provided it were made in good faith, with probable cause, to be ascertained from the surrounding circumstances, and a state of facts honestly believed to be then in existence.

We have considered the evidence in the case, and think with the jury that the defendants were not actuated by malice, that they acted in good faith and were justified from the condition of things, to infer that the plaintiff had been guilty of misrepresentation at the time the insurance was effected on the boilers.

In Cook's Law of Defamation (marg. p. 60, Law Library, vol. 22), the rule is laid down:

"The proceedings connected with the judicature of the country are so important to the public good, that the law holds that nothing that may be therein said with probable cause, whether with or without malice, can be slander; and in like manner, that nothing written with probable cause, under the sanction of such occasion, can be libel."

Townsend, in his work on Slander and Libel, 2d. ed. § 221, says, that the right of appealing to the *civil* tribunals is more extensive than the

right of appealing to the criminal tribunals and that, according to the better and prevailing opinion, whatever a party may allege in his pleading as, or in connection with his ground of complaint, can never give a right of action for slander or libel. The immunity thus enjoyed by a party complaining, extends also to a party defending.

Those principles appear to have been recognized in the jurisprudence of this State. 6 N. S. 477; 21 An. 375; 28 An. 436; 14 An. 406.

The failure to succeed is not evidence of malice or of want of probable cause. 3 R. 18; 34 Ala. 336; 13 Gray, Mass., 201; 98 U. S. 187; 1 Hilliard on Torts. See, also, 5 La. 318; 13 La. 90; 15 La. 280; 12 An. 335; 530, 714; 6 An. 178; 13 An. 274; H. D. p. 823, No. 6.

The question of probable cause depends upon the party's honest belief, based upon reasonable grounds. 66 N. Y. 526; 32 An. 511; Cooley on Torts, p. 181; 2 Tredell Law, N. C. 236; 8 Dana, Ky., 310; 26 Ala. 616; 33 Vermont, 489.

The plaintiff says in his testimony that the boilers were new, and that he bought them as such, at Bagdad, for upwards of \$2000.

The custom-house certificate, which was offered and introduced in this suit, and which was not produced on the trial of the suit on the policy, mentions them as *dos calderas de vapor usadas*, as part of the cargo of the "Matias," bound for New Orleans. Witnesses heard on behalf of plaintiff show that the boilers were second-hand. They had previously served on a steamer which had wrecked, had been inventoried and had been sold with other articles at auction for \$125. A witness, whose testimony the plaintiff violently assails as that of a vagabond, unworthy of belief, declares also that the boilers were not new and had been repaired at the foot of his wharf. His testimony is not indispensable.

The defendant has shown that the boilers, if new, would have been worth \$2868, including the steam and mud drum, valued at upwards of \$1200, leaving as the value of the boilers \$1668.

It may be, that, on the trial of the suit on the policy, the defendants did not establish fraud to the satisfaction of the court, but such omission does not necessarily require them to be mulcted in damages. In the opinion delivered in that case, and which is unreported, the Court merely said: "An over-valuation is not even established with any certainty, but if it were, it would not, in itself, be proof of fraud."

The defendants may have failed to prove the fraud charged and, in consequence, may have lost the case; they may, as they were, have been condemned in damages for a frivolous appeal, but they do not, on that account, necessarily become liable in the present action. What was not there shown, could be, and was in this case, established.

We find that the charge complained of was made on an issue pertinent to a case in which the defendants were parties, in good faith, with

probable cause, and under circumstances which suggested and justified it at the time. See *Stewart vs. Sonneborn*, 98 U. S. 191.

This was a suit peculiarly within the province of the jury. We have read the charges given to them by the court, to which no exception was taken, and we think that the verdict and the judgment upon it have done justice to the parties.

It is, therefore, ordered that the judgment appealed from be affirmed with costs.

No. 8300.

THE STATE OF LOUISIANA VS. WILLIE KANE.

It is not material, in a prosecution for larceny, that the Information should state the exact day of the commission of the offense, provided the proof shows that it was committed within one year of the filing of the Information. This is not an open question any longer. Nor is the allegation of ownership of the thing stolen material in cases of larceny. Affirming Decision in 33 An. 120.

A PPEAL from the Criminal District Court for the parish of Orleans.
Roman, J.

J. C. Egan, Attorney General, for the State, Appellee:

First—In an information for larceny it is sufficient to allege the ownership of the property stolen to be in the ostensible or apparent owner. 33 An. 122; *Wharton on Criminal Law*, 8th ed., vol. 1, Sec. 945.

Second—Time is not of the essence of the commission of larceny, and the information is satisfied by proof of any day anterior to the filing of the charge, provided it be within one year. *Bishop on Criminal Procedure*, vol. 1, Sec. 400.

Third—This Court has jurisdiction in criminal cases on questions of law alone. Constitution, Art. 81; 11 An. 478.

The Defendant and Appellant unrepresented.

The opinion of the Court was delivered by

POCHÉ, J. The defendant appeals from a conviction and sentence under a charge of larceny of some money, the alleged property of Mrs. Mary Schoemmel.

He reserved a bill of exceptions to the ruling of the judge in admitting testimony showing that the offence was committed on the 28th of December, 1880, because the information charged that it had been committed on the 4th of January, 1881. It is now not an open question that time is not of the essence of the commission of the offence of larceny, provided the proof shows that the offence was committed within one year of the filing of the information, which in this case was filed on April 8th, 1881.

Bishop, in his work on Criminal Procedure, vol. 1, Sec. 400, lays down the rule in the following clear and unambiguous language:

State of Louisiana vs. Succession of Taylor.

"It is not necessary to prove the offence to have been committed on the day of the month and year specified in the indictment. Any day before or after, within the statute of limitations, is sufficient." *State vs. Hypolite Polite*, 33 An., not yet reported. There is no force in the reasoning of defendant's counsel, that he had pleaded not guilty to the offence charged to have been committed on the 4th of January, 1881, thus fixing the issue between time and the State to that particular date, and that he was prepared to prove an *alibi* on that date. As the jury found, beyond doubt, that the offence had been committed by the defendant on the 28th of December, 1880, it was immaterial to consider his whereabouts on any other day. In a plea of not guilty to an indictment, the issue presented between the State and the accused is one of guilt or innocence of the charge preferred, and is not circumscribed by the date alleged, in the absence of proof of prescription within the statute of limitations.

The defendant moved for a new trial on the grounds:

1st. That there was no proof of the ownership of Mrs. Schoemmehl of the property charged to have been stolen, the proof showing that the money belonged to the succession of her husband.

This objection is disposed of by referring to the case of the *State vs. Everage*, 33 An. 120, in which an identical objection was overruled, and in which this Court held that such a question might be raised in a civil action involving the legal title of property, but not in a criminal case where the issue was not the legal title of the property, but the felonious taking of the same by the accused.

2d. The other grounds set up in his motion for new trial, involve questions of facts, with which this Court cannot interfere. Those grounds can, therefore, not avail the accused in this appeal. There is no error in the judgment of the lower court, which is, therefore, affirmed.

No. 8136.

THE STATE OF LOUISIANA VS. SUCCESSION OF RICHARD TAYLOR.

The Defendant in a suit brought by the State of Louisiana in her own courts, cannot require her to furnish security for costs.

A PPEAL from the Civil District Court, parish of Orleans. *Monroe, J.*

J. C. Egan, Attorney General, for Plaintiff and Appellant:

First—The State is sovereign in so far as she has not parted with her attributes of sovereignty to the Federal government.

Second—In a monarchy the exemption of the sovereign from the operation of statutes in which he is not named is founded on prerogative. 1 Watts (Pa.) 54; 2 Blackstone, 400.

State of Louisiana vs. Succession of Taylor.

Third—The prerogative is a principle of our government and a part of the law of the land. *Ib.*; 19 Wall. 239.

Fourth—The people of the State, being the sovereign, have succeeded to the rights of the King, the former sovereign. 4 Crown (N. Y.), 349.

Fifth—No court can make a direct judgment against the United States for costs and expenses in a suit to which she is a party, either on behalf of any suitor or any officer of the government. 12 Wheaton, 550.

Sixth—If the people were plaintiff no judgment for costs could be given against them. 80 Ill., 441; 41 N. H., 238; 18 Johnson, 229; 4 Cowen, 345; 1 Kent Com. 297, note E.

Seventh—In the construction of statutes declaring or affecting rights and interests they are not to be interpreted so as to embrace the sovereign power of the State unless the statute specially named, or it be clear and indisputable from the act that it was intended to include the State. Sedgwick on Construction of Statutory Law, p. 337; 1 Blackstone Com. 262; 15 East, 333; D. Warriss on the Construction of Statutes, p. 151; 1 Kent, 460; 4 Mason Cr. Ct. Rep., p. 427; 28 Miss., 753; 20 Wal., 255; 4 Gil., 20.

Eighth—The State is exempt from giving bond and security. 5 R. 237; 33 An. 712.

Kennard, Howe & Prentiss for Defendant and Appellee:

First—Where a State is brought into the forum of litigation upon a contract, and, *a fortiori*, when she herself comes in, asking for an enforcement of contract rights "she can claim no immunity as incident to her political sovereignty." *Davis vs. Gray*, 16 Wall. 232.

Second—The dogmas cited by the Attorney General with reference to monarchies, are not followed in the enlightened and free community of Louisiana. Thus the doctrine, *nulum tempus occurrit regi*, has been disregarded in matters of contract, where the State was suing. *Succession of Zacharie*, 30 An. 1262; *Graham vs. Tignor*, 23 An. 570; *Pepper vs. Dunlap*, 9 An. 141.

Third—In the case at bar, the State is suing upon her alleged contract. There is no reason why she should stand in any other position than any other litigant. She makes a claim which is technical. She takes out a writ which is harsh. She seizes money of defendant and spends it in useless costs. The doctrine that the State is not included in statutes unless specially mentioned, is not recognized in Louisiana. 23 An. 570; 9 An. 141. And it therefore follows, that in such a case as this, where the State sues on its contract, she must give security like any other suitor.

Fourth—The rule that a plaintiff may be required to secure the costs to which the defendant may be unjustly put, in case the defendant succeeds, is a rule of practice founded on the simplest notions of justice. The State has no more right to evade it than has any other litigant. The argument of the Attorney General proves too much. If correct, it would allow the counsel of the State to ignore any article of the Code of Practice, according to their whim or convenience.

The opinion of the Court was delivered by

LEVY, J. The question presented for our decision, in this appeal is: can the State be required to furnish security for costs in a suit instituted by herself, in her own courts, on the demand, to that effect, by the defendant?

The State of Louisiana instituted this suit against the Succession of Richard Taylor, the object sought being the rescission of a contract of lease of the New Canal.

Defendant obtained a rule on the State to show cause why the State should not give security for costs. The rule was made absolute; the

State refused to furnish the security, whereupon the case was dismissed and from the judgment of dismissal the State has appealed.

The main ground upon which the appellee relies to sustain the correctness of his position and upon which the judge *a quo* bases his judgment is, that the State comes into court "upon a contract asking for an enforcement of contract rights" and, therefore, "she can claim no immunity as incident to her political sovereignty."

This doctrine, however sound, has no applicability to the question now before us. We are not called upon to decide as to the merits or demerits of any claim based upon a contract in which the State is interested or which she seeks to enforce or rescind, but merely as to the liability of the State to be amerced in costs in a proceeding instituted in her own courts. The authority of *Davis vs. Gray*, 16 Wallace, 232, relied upon by counsel of appellee, does not, in our opinion, sustain his position. There it was sought to enforce the obligation of a contract, and the court held: "That the act of incorporation and the land grant here in question, were contracts, is too well settled in this Court to require discussion. As such, they were within the protection of that clause of the Constitution of the United States which declares that, no State shall pass any law impairing the obligation of contracts. * * * When a State becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances. When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty." We construe this as having relation only to the incapacity of the State to assert its right growing out of its State sovereignty, to do any act which may impair the obligation of a contract, because such act would contravene the article of the Federal Constitution. Any different construction would subvert what we regard as the settled jurisprudence of the Supreme Court of the United States and would oppose itself to the adjudications of several States of the Union on the subject of the non-liability of a State to pay costs. We think there is a marked distinction between the cases falling under the rule above quoted and that of the liability of the State to enforce a remedy or means of enforcement of a contract before its own tribunals. In 2 Wheaton, 395, the Supreme Court said: "The United States never pays costs." In 12 Wheaton, 550, "It is a general rule, that no court can make a direct judgment or decree against the United States for costs and expenses in a suit to which the United States is party, either in behalf of any suitor or any officer of the government." In 5 Howard, 29, "The United States is not liable for costs." The Supreme Court of Alabama, in the case of *Gwema vs. Powell and Bradley*, held that, "No costs can be adjudged against the State when it is plaintiff in a civil

N. O. City Railroad Company vs. Crescent City Railroad Company.

action and fails in its suit." So, also, in Vermont, 2 Tyler (Vt.) R. 44; 4 Gill & Johnson, Md. R. 407. In 1 Gilman (Ill.) R. 555, it was held: "A State is never bound to give a bond for costs in any case; neither does it ever pay costs, except in some particular way pointed out by statute," 12 Ill. 154; 4 Gil. 20; 1 Scam. 178; 50 Ill. 441.

The same policy and reasons which exempt the State from the necessity of giving bond in cases of appeal, &c., apply to security for costs. And, if the State is not liable to pay costs, it would be a vain and useless thing to require security therefor. The present suit is one in which the State is a party in her own name and to enforce her own rights and not those of any person or individual. In her own courts, constituted by herself, whose officers are appointed by herself, and whose costs and fees are paid by herself out of a fund specially created for that purpose, it would be an extraordinary proceeding to require her to furnish security for the payment of costs. We think the court below erred in its judgment.

The judgment appealed from is annulled, avoided and reversed, and this case is remanded to the Civil District Court of the parish of Orleans to be proceeded with according to law.

No. 8137.

THE NEW ORLEANS CITY RAILROAD COMPANY VS. THE CRESCENT CITY
RAILROAD COMPANY.

ON MOTION TO DISMISS.

This Court cannot take cognizance of evidence outside of the Transcript, in support of the charge of Appellant's acquiescence in the judgment appealed from. The case must be remanded for the purpose of such investigation.

It is only when the fact alleged on one side is expressly admitted on the other, that the remanding is unnecessary. The jurisdiction of this Court in such cases clearly defined.

When an Appeal is taken from the decree of a State Court ordering the removal of the case to the United States Circuit Court, under the laws of Congress, and the Appellant himself files the Record in the Federal Court and there moves for the dissolution of the Injunction granted by the State Court, there is an acquiescence by the Appellant in the judgment appealed from and the Appeal will be dismissed by this Court.

A PPEAL from the Civil District Court, parish of Orleans. *Monroe, J.*

Carleton Hunt for Plaintiff and Appellee:

A party who acquiesces in a judgment rendered against him by voluntarily executing the same cannot appeal therefrom. C. P. 567.

This Court will take judicial notice in an especial manner of the course of proceeding, the decision and the jurisprudence of the Circuit Court of the United States for the Fifth Judicial Circuit, District of Louisiana.

N. O. City Railroad Company vs. Crescent City Railroad Company.

John M. Bonner for Defendant and Appellant:

First—The Supreme Court will consider original evidence when all parties consent. 3 An. 115; 28 An. 274.

Second—The doctrine of acquiescence is not applicable to the decrees or orders of a judge transferring a cause from a court of general jurisdiction to a tribunal of limited jurisdiction. A judgment can only be acquiesced in when it can be voluntarily executed. And courts of limited jurisdiction depend for the exercise of their functions on the law, and not on the consent of litigants. 22 An. 81, 134; 27 An. 625.

Third—The necessity of the State and Federal Circuit Courts being certain of their jurisdiction, before proceeding with a cause, is enforced by the nullity that attaches to their actions when they are without jurisdiction. 9 Otto, 80; 29 An. 372; 29 An. 400; 10 Otto, 457; Dillon on Removal of Causes, 3d ed. p. 130.

Fourth—The rule enforced in Federal Courts, that a party loses none of his rights by contesting the case in the State Court, after it has refused the application for a removal, should be equally applicable to the State Courts. 19 Wall. 214; The Removal Cases, 10 Otto, 475; Dillon on Removal of Causes, 3d ed. p. 130.

Fifth—The cause was jurisdictionally removed into the U. S. Circuit Court when the order of removal was signed by the District Judge, and the injunction granted by the State Court remained in full force by the very terms of the statute, until modified or dissolved by the Circuit Court. Act March 3, 1875, §§ 3, 4.

As soon as a copy of the record from the State Court was filed, the jurisdiction of the Circuit, which was before theoretical, became real. 4 Sawyer, U. S. C. C. R. 290, 291; Dillon on Removal of Causes, 3d ed. §§ 78 and 80.

Fifth—Defendant did not consent to go into the Federal Court by taking up the record, but simply prevented the plaintiff from putting the record into its pocket until the 4th Monday of April, 1881, and in this manner keeping its injunction in force without having it contested.

MOTION TO DISMISS.

The opinion of the Court was delivered by

POCHE, J. Appellee moves to dismiss the present appeal on the ground that appellant has acquiesced in the judgment appealed from. The appeal is taken from a decree, rendered on plaintiff's petition, ordering the removal of the cause to the United States Circuit Court.

Appellee charges that appellant has acquiesced in the judgment of removal by voluntarily appearing before the Circuit Court, and filing therein, and arguing by counsel, a motion to dissolve an injunction previously rendered in favor of plaintiff by the Civil District Court. To the motion of dismissal are annexed two documents; one, a certificate of the clerk of the Circuit Court, tending to show the appearance of appellant, and the other, a certified copy of the motion filed by appellant in that court, for the dissolution of the injunction, and of other proceedings had in the cause.

These documents come before us as original evidence, which, as an appellate court, we cannot consider. The question as to the power of this Court to pass upon evidence, outside of the transcript, in support of the charge of appellant's acquiescence in a judgment appealed from, was at one time involved in some doubt.

But the doubt has been completely dispelled by the more recent decisions of this Court, and we consider the negative of that proposition as firmly settled.

The rule is now that the trial of such a question, requiring the investigation of original evidence, must be remanded to the court *a qua*; see case of Stinson vs. O'Neal, Opinion Book 52, page 390; 29 An. 576; 28 An. 274.

Appellee's counsel suggests that we must take judicial cognizance of the matters and facts, recited and contained in the documents annexed to his motion, and supports his views by the following quotation from Greenleaf:

"Courts take notice of courts of general jurisdiction, their judges, their seals, their rules and maxims in the administration of justice and course of proceeding." Greenlf. on Evid., vol. , § 6. * * * "In fine, courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction." (Id.)

We fully recognize the doctrine thus laid down, which has always been practically followed by this Court.

But the doctrine cannot be extended so as to authorize this Court to take judicial cognizance of the appearance, acts and pleadings or motions of litigants in the Federal courts, or even in our own State courts.

The issue presented by the present motion necessitates a finding or decision on a question of fact, of which we cannot assume original jurisdiction.

It is, therefore, ordered that the question whether appellant has acquiesced in the judgment appealed from, be referred to the court *a qua* for trial according to law; and that its finding and judgment upon that issue be sent up to this Court in due course.

ON APPLICATION FOR REHEARING ON THE MOTION TO DISMISS APPEAL.

Todd, J. The motion to dismiss was upon the ground that the appellant had acquiesced in the judgment from which he had appealed. To establish such acquiescence, certain documents were sent up with the transcript and annexed thereto. We declined to consider such original evidence presented for the purpose stated, and with a view to enable the appellee to show that the proceedings, which said documents purported to evidence, and which were relied on to establish the acquiescence charged, had taken place, we remanded the case.

The appellant's counsel, in his brief for a rehearing, admits, and for the first time, the facts that the proceedings purporting to be shown by the documents did take place, and asks us to consider this documentary evidence and pass upon the effect of the same.

This admission supplies the proof, which it was the object of the remanding of the case to procure. Our former decree is, therefore, set aside, and the appeal reinstated as standing on the motion to dismiss, which will be again considered with reference to the admission made as stated, and the effect of the facts admitted, determined.

ON REHEARING.

BERMUDEZ, C. J. Plaintiff and appellee seeks to dismiss this appeal on the ground, that the defendant has acquiesced in the judgment appealed from, by voluntarily executing it.

The facts advanced, as constituting acquiescence, are admitted by the defendant company, which simply denies "the conclusion sought to be drawn" from them.

The appearance of defendant, we deem to be, in the nature of an exception of no cause of action.

This action has for its object, the recognition of the plaintiff, as lawful owner of certain railroad franchises represented as about to be invaded by the defendant; an injunction was asked and obtained *in limine*, the perpetuation of which is prayed for in the petition.

The suit was brought on the 14th of December, 1880. Shortly after, viz: on the 20th, the plaintiff prayed for its removal to the United States Circuit Court for the District of Louisiana, and the order was made. On the 31st of the same month, the transcript was filed in that Court. On the 5th of January following, 1881, the defendant moved there, to dissolve the injunction. The motion was tried on the 7th following, and was dismissed on the ground of prematurity, the return day not having arrived. On the 11th of January, 1881, the defendant appeared in the District Court, moved for and obtained an appeal from the order of removal, returnable to this Court on the 3d Monday of January*ult., when the transcript was filed here.

The motion to dismiss should prevail.

The theory upon which the defendant predicates its resistance to the dismissal of the appeal, is radically fallacious. The erroneous assumption underlying it consists in taking for granted that no judgment can be acquiesced in, unless it be one on the merits of a case, susceptible of execution; while the true and sound doctrine is, that any order, decree, judgment, or judicial determination whatever, whether interlocutory, final or definitive, appealable or not, executory or not, can be acquiesced in, submitted to, or ratified, so as for ever to set at rest the matter adjudicated upon. Innumerable instances could be easily furnished in verification. See 6 M. 723; 10 An. 455; 27 An. 625. Acts of acquiescence or ratification of judgments, in all cases constitute in-

superable impediments, prohibitive of all and any further discussion, touching the correctness of the adjudication acquiesced in or ratified. Litigants are not permitted, for reasons of public order, to play fast and loose, in judicial proceedings, particularly when they are of such solemn character.

It is true that the judgment appealed from is not one on the merits of the case, but it is a judgment which can cause no irreparable injury, and from which a *devolutive* appeal undoubtedly lies. 2 M. 177; 6 N. S. 712; 5 L. 378; 9 An. 241; 29 An. 372; 21 An. 233; 23 An. 29; 30 An. 474; 2 Woods, 120. Otherwise, why has the defendant asked for an appeal; why was one allowed; why does the defendant resist the motion to dismiss, and does it insist upon our reviewing the order of removal? It is a decree from which the defendant could have abstained from appealing,—one the correctness of which it could have formally acknowledged. That which it could have done expressly, it could do and has done impliedly.

The decree appealed from is not now before us for review. We cannot, on a motion to dismiss, inquire into its correctness. All that we are now called upon to do is to decide whether the acts of the defendant, which consist in taking up the record and moving, in the United States Circuit Court, for the dissolution of the injunction, are acts of acquiescence in the judgment appealed from, which debar the right of having it revised on appeal. C. P. 567. By thus acting, it is clear that the defendant has virtually acknowledged the correctness of the order of removal, and admitted that the Circuit Court had jurisdiction over the case removed. If this be not so, why did the defendant ask of that court the exercise of its powers to dissolve the injunction?

In consequence of the acts of the defendant, we have nothing to do presently with the order of removal or with the question of jurisdiction of the United States Circuit Court over the removed controversy. The order complained of may be perfectly incorrect, and the Federal court may have no jurisdiction at all over the case; but, however that may be, the defendant,—by formally admitting the correctness of the decree of removal, which it has itself executed, and the jurisdiction which it has endeavored to set in motion,—has debarred itself from a hearing on its appeal in this Court.

In the very case of *Buntin vs. Johnson*, 27 An. 625, quoted by appellant, the doctrine which we advance was clearly intimated. The Court said:

"The acquiescence which prohibits an appeal, or which destroys an appeal, when taken, is the acquiescence in a decree which commands something to be done or given. If the thing commanded to be done or given, is done or given, the judgment is acquiesced in. It is a confes-

sion that the judgment is correct, and one cannot admit that a judgment is correct and then appeal from it."

In the case before us, the order of the District Court directed the removal of the suit to the U. S. Circuit Court. It was a decree susceptible of execution. By taking up the record of the suit ordered to be removed to the U. S. Circuit Court, and invoking the powers of that court, the defendant has executed the judgment and has acquiesced in it. It has also admitted the jurisdiction of that court and has no right to be heard here.

The question of jurisdiction does not appear to have been, at all, raised in the Circuit Court. That jurisdiction is statutory. It can be conferred neither by acquiescence nor formal consent. If that court have no jurisdiction, the defendant may still ask it so to declare; but, under the present aspect of things, we have no authority to say whether the case is one that could be removed, whether the Circuit Court has jurisdiction, whether the District Court properly removed the suit. We must pass upon the motion to dismiss.

We, therefore, decide that the defendant has acquiesced in the decree of removal, which is the judgment appealed from, and that, after doing so, it could not appeal from it. 4 R. 85; 18 An. 62; 28 An. 274, 744; 18 An. 264; 4 An. 150; 14 La. 523; 14 An. 328; 23 An. 38; 29 An. 576.

For the purpose of demonstrating consistency in the two rulings previously made in this case on the application before us, we deem it proper to state, that, when the motion to dismiss was first submitted, it raised an issue of fact, which, under the jurisprudence, we referred to the District Court, and that it is only after the decree of reference was made, that it was claimed that we had misconstrued the attitude of the appellant, who, far from disputing, had admitted the facts. Unwilling that any misconception on our part should effect the rights of either party, we recalled our first ruling and reinstated the previous order of things which we have just considered.

While on this subject, we think proper to say, that the jurisprudence of this Court, in matters of this description, is: that, on a motion to dismiss on the ground of acquiescence by the appellant, the issue of fact, if in the least disputed or doubtful, must be referred to the lower court for inquiry and adjudication, subject to review by this Court. The reference is necessary as this Court has no original jurisdiction in such cases. 28 An. 272; 23 An. 37; 29 An. 576; 20 An. 574; 21 An. 666; 22 An. 31; 32 An. 665.

Nevertheless, where the facts averred in the motion are not controverted, but are admitted, and the Court is not called upon to realize them by an examination of documents, it would be a vain thing to refer to the lower court a matter involving a pure question of law affecting the

Guéringer vs. His Creditors.

appellate jurisdiction of this Court, which this Court can and should determine, whenever it is legally possible to do so.

While so holding, we keep in view and reiterate the ruling in 32 An. 665, in which we were pressed upon to deal with a mass of original documents, not found in the transcript, but filed in this Court, and submitted to enable us to ascertain whether a corporation was "going" or defunct. It was a fact upon which there was no positive admission in the ably guarded statement of facts signed by counsel.

In conclusion, we distinctly announce, that, as a rule, we will not consider issues of fact raised by motions to dismiss, and that we will pass upon the merits of such motions only where the facts are clearly averred by the mover and admitted by the appellant, or appear clearly in the transmitted record.

The motion to dismiss is sustained, and the appeal is dismissed at appellant's costs.

No. 8043.

E. J. GUÉRINGER VS. HIS CREDITORS.

In the additional delay granted the Appellant to file the Transcript, the last two days not being legal days should not be counted, and he is in time if he files the Transcript on the first legal day thereafter.

This Court will not pass upon objections to the admissibility of evidence, if the Transcript does not show that the Court below ruled upon the objections and the ruling was properly excepted to for review.

The wife, as individual creditor of her husband, cannot compete with the partnership creditors of an insolvent firm of which he is a partner, in the distribution of the partnership assets. The fact that the other co-partners had retired from the firm and that the husband alone asked for a respite and made a surrender, does not alter the principle.

The partnership creditors share equally with the individual creditors in the individual assets.

A PPEAL from the Civil District Court for the parish of Orleans.
Monroe, J.

Chas. S. Rice for Mrs. Guéringer, Opponent and Appellant :

First—The creditors, having forced a surrender by E. J. Guéringer; having proved their claims as debts of him, personally; having elected a syndic as his syndic; having caused the property to be surrendered as his, and the syndic having sold the same as his, and filed an account for a distribution of his assets, to which the creditors have made no objections, cannot, at this stage of the case, claim these proceedings to be the *cessio bonorum* of E. J. Gueringer & Co.

Second—The facts, being as recited in No. 1, above, the creditors cannot, at the same time, claim the proceeds and deny the title by which they are brought into court.

Third—The rents and proceeds of the insolvent's real estate, amounting to \$1752.80, are by law devoted to the *pro rata* payment of all his debts.

Fourth—The opponent ought to share, not only in said rents and revenues, but also in the proceeds of her insolvent husband's mercantile assets.

Guéringer vs. His Creditors.

Breaux & Hall for the Syndic, Appellee :

"Partnership assets are a trust fund for partnership creditors, who must be paid before the partners, and so their creditors, can touch anything." 2 An. 87, 810; 3 An. 189, 319; 5 N. S. 629, 568; C. C. 2823 (3794); 12 La. 370; 13 La. 279; 2 R. 453; 11 R. 130.
Partnership effects are privileged for partnership debts. 3 La. 497; 17 La. 596; 6 An. 771.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

Todd, J. The motion to dismiss the appeal is upon two grounds :

1. That there was no order for the appeal.
2. That the transcript was filed too late.

First. We find from our examination of the record, that there was an order of appeal regular in every respect.

Second. On the 16th December, 1880, the appellant applied for and was granted a delay of ten days for filing the transcript. The 9th day, the 25th, was Christmas; the next, the 26th, was Sunday. It was filed on the 27th of December, and was in time, the two last days of the delay not being legal days, should not be counted. 24 An. 333.

The motion to dismiss is, therefore, denied.

ON THE MERITS.

In 1875, Ernest J. Gueringer, Jules Gueringer & A. M. Carriere, established a commercial partnership in the City of New Orleans for buying and selling gentlemen's furnishing goods, under the firm name of E. J. Gueringer & Co. In July, 1877, Jules Gueringer retired from the firm. The business was still conducted under the same name until March, 1879, when Carriere also retired, leaving E. J. Gueringer in possession of the assets of the partnership to carry on the business in his own name. Two weeks after the retirement of Carriere, Gueringer filed a petition for a respite, citing the creditors of Gueringer & Co. and asking a delay of one, two and three years to pay their respective demands.

In his petition he refers to the business "as lately carried on under the name of Gueringer & Co., a commercial firm composed of petitioner and C. A. Carriere; that the said firm was lately dissolved, the said Carriere retiring therefrom, and your petitioner assuming the debts of the concern."

The application for a respite was opposed by the creditors and a syndic, selected by them, was appointed to administer the property surrendered. This property consisted entirely of the stock of goods, accounts, &c., of the partnership of E. J. Gueringer & Co., except certain city lots described in the schedule, and buildings thereon. All the property was sold, and the syndic rendered his account and tableau showing

Guéringer vs. His Creditors.

proceeds insufficient in amount to settle one-half the debts, which he proposed to pay *pro rata*.

Mrs. Gueringer, wife of the insolvent, filed her opposition to the account and tableau, in which she claimed to be a creditor of her husband for ten thousand dollars, and asked to share equally in the distribution of the proceeds with the other creditors.

Her application was dismissed and she has appealed.

Mrs. Gueringer's claim is opposed by the creditors on two grounds:

1st. Its existence is denied.

2d. If it exists, it is alleged to be due by the insolvent individually, and cannot legally be paid out of the partnership assets, which should be devoted to the payment of the partnership creditors, and it was averred that all the effects surrendered belonged to the partnership.

First. Mrs. Gueringer's claim was based on a donation alleged to have been made to her by her mother on her marriage, in Havana, in 1871, and to have consisted of ten thousand dollars in money, which, it was further alleged, had been received by her husband and used by him in his business, in New Orleans. She is clearly not a creditor of the partnership. The proof of her claim consists of the depositions of a number of witnesses taken under commission before the United States Consul at Havana.

The interrogatories to these witnesses were objected to by the counsel for the creditors, before crossing, on the ground that they were leading, and suggestive of the answers. When the depositions were offered on the trial, the objections were renewed. We find from the minutes that they were received "subject to the objections." It does not appear that any ruling was ever had upon the objections—whether in the decision of the case they were sustained and the testimony rejected, or overruled and the testimony received and considered.

The counsel having failed to obtain a ruling on his objections, and to have the ruling placed on record, and to retain his bill to the same if adverse to him, we cannot consider the objections at this stage of the proceedings, in the entire absence of any ruling of the judge *a quo* to review. Finding the depositions on the note of evidence, as offered and filed in the case, *and not rejected*, we shall accept them as proper evidence, and give them the consideration they are entitled to, notwithstanding the formidable character of the objections made to them. To enable us to pass on an objection to the admissibility of evidence, the record must show that it has been ruled on in the lower court, and the ruling complained of properly brought to our attention by a bill of exceptions. This evidence proves that Mrs. Gueringer did receive from her mother and turn over to her husband the ten thousand dollars given her.

Second. It is clearly shown that all the property surrendered and sold, with the exception of the city lots and rents thereof, belonged to the partnership, of which the insolvent was a member, and that all the creditors, except the opponent, were creditors of that partnership. The debts due them were for goods bought by Carriere as a member of that firm. As such creditors, they were entitled to the proceeds of those goods, and there is nothing in the proceedings which could be held to affect such right. The counsel for Mrs. Gueringer insists that as the proceeding was instituted by Gueringer individually, and was thus conducted throughout, the creditors mentioned must be considered as his individual creditors, and had lost all rights as partnership creditors. We see no force in this proposition. The members of the partnership were bound to the creditors *in solido*. Gueringer was the only one of them connected with the proceedings. The creditors did not inaugurate these proceedings, and could not control or change them, and took part in them just as they found them. The retiring of the other members of the firm on the eve of the surrender deprived these creditors of no rights against the partnership, or the individual members thereof, or against the goods sold by them to the partnership. Though the member surrendering had assumed to pay for the goods when the other partner retired, yet this assumpsit did not affect the creditors who were no parties to it nor contributing thereto.

Partnership effects are privileged for the partnership debts. C. C. 2823; 3 L. 497; 17 L. 596; 6 An. 771. The whole partnership assets were properly applied to the payment of the partnership creditors. 6 An. 509; 12 An. 698.

Among the effects surrendered in this case we have mentioned certain real estate consisting of city property. We are satisfied that this property belonged to Gueringer individually, and never at any time formed part of the partnership assets. It was not occupied or used for the partnership business, and there is no evidence that the partnership, or the members of the firm, save E. J. Gueringer, ever had any interest in it. This property (described as No. 28 Chartres street) sold for \$1200, and the rents of this property, also surrendered, amounted to \$552 80, making together \$1752 80. Mrs. Gueringer is, however, not entitled to the whole of this amount, although it is the individual property of the insolvent, and she an individual creditor; for it is well settled that partnership creditors share equally with individual creditors in the individual assets of the partners. C. C. 3185; 8 N. S. 599; 2 L. 113; 17 L. 596; 3 An. 189. This sum must be distributed *pro rata* between Mrs. Gueringer, as an individual creditor of her husband, and the other creditors, appellees, and the judgment appealed from must be amended accordingly.

Hernsheim & Bro. vs. Levy & Co.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court be amended as follows: that Mrs. Aurora Mascino, wife of Ernest J. Gueringer, be recognized as a creditor of said Gueringer for \$10,000, with legal interest from the filing of her opposition, February 11, 1880, and that her opposition to the tableau of H. H. Pearson, syndic, be sustained so far as to allow the said opponent to *pro rate* with the appellees in the proceeds of the sale of the immovable property of said Gueringer and the rents thereof, amounting to \$1752 80, and without prejudice to the right of the said opponent to assert hereafter the unsatisfied balance of her claim, but not against the funds in question; and the judgment, as thus amended, is affirmed, the appellees to pay costs of appeal.

Mr. Justice FENNER recuses himself, having been of counsel.

No. 8303.

S. HERNSHEIM & BRO. VS. ISIDORE LEVY & CO.

ON MOTION TO DISMISS.

No Appeal lies from an order transferring a case from one to another Division of the Civil District Court for the Parish of Orleans, because such order is interlocutory and cannot cause an irreparable injury. Affirming Decision in 31 An. 47.

A PPEAL from the Civil District Court for the parish of Orleans.
Houston, J.

Joseph P. Hornor and Francis W. Baker for Appellees.

T. Gilmore & Sons for Appellants.

MOTION TO DISMISS.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiffs instituted suit and recovered judgment against defendants, and made several fire insurance companies garnishees by process of attachment. The companies filed exceptions, before the trial of which the syndics of the insolvent defendants made appearance, and suggesting the accepted surrender in insolvency of the defendants, and that said proceedings were pending before Division C of the said Civil District Court, moved the transfer of the cause to that court from Division B, where the original suit had been filed.

From the order or judgment making such transfer, defendants have taken the present appeal.

Among other grounds, appellees urge that no appeal lies from a decree ordering the transfer of a cause from one State court to another. In their briefs on this motion, counsel for defendants direct their argument to show that the order of transfer was erroneous.

But these arguments, though strong and learned, are not applicable

State ex rel. Selles vs. Judge of Twenty-first District Court.

to the only point at issue. It is whether the judgment complained of, even if erroneous, would cause irreparable injury to the defendants. As the case could and will be reviewed by us on appeal, the alleged error of the judge in ordering the transfer of the cause, will be corrected, and the cause remanded to the proper tribunal. Thus the injury caused to defendants would be remedied, and it follows, therefore, that it is not irreparable. Art. 566 of the Code of Practice, granting the right of appeal from interlocutory judgments, has been frequently interpreted and expounded by this Court, and was the subject of an exhaustive opinion in the case of State ex rel. Fontelieu vs. Judge, 31 An. 47, in which previous opinions of this Court, on the same point, were fully reviewed.

In that case, our immediate predecessors correctly held and ruled that a judgment ordering the transfer of a cause pending in a State court to another State court, could not cause irreparable injury to any of the parties in the case, whose complaints could be investigated and passed upon in the appeal from the final judgment in the cause.

The question is, therefore, no longer an open one, and appellees' motion must prevail. Todd vs. Andrews, 3 N. S. 25; Powell vs. Kellar, 1 An. 25; Pooley vs. Morehouse, 13 An. 300.

It is, therefore, ordered that this appeal be dismissed at appellants' costs.

No. 8323.

THE STATE OF LOUISIANA EX REL. MARTHA SELLES VS. THE JUDGE OF THE
TWENTY-FIRST JUDICIAL DISTRICT COURT, PARISH OF ST. MARTIN.

APPPLICATION for Writs of Certiorari and Prohibition.

This Court will not issue the writs of Certiorari and Prohibition, in exercise of its supervisory power over inferior courts, except in cases of usurpation of jurisdiction or power. Previous Decisions affirmed.

Fontelieu, Judge, Respondent.

Edward Simon, for the Relatrix.

C. H. Mouton and *Mouton & Martin* for the Respondent.

The opinion of the Court was delivered by

Todd, J. The relatrix applies to this Court for writs of *certiorari* and prohibition against the defendant judge under the following circumstances:

On the 2d of August, last, Joseph Dessens, husband of relatrix, alleging that his wife had left the matrimonial domicile on a visit to her parents with his consent, taking with her their child, about two years of age, and had failed to return to his domicile at his request, or to bring back the child, or surrender it to him when demanded, applied for a writ of *habeas corpus* to the District Judge named above. The writ was

granted, commanding the relatrix to bring before him, the said judge, the child mentioned, and show by what right or authority she detained him. So soon as the order was rendered, the relatrix presented her petition to one of the Justices of this Court, asking for writs of *certiorari* and prohibition, with a view to prevent the execution of the writ of *habeas corpus* or any further proceeding under it. The allegations of her petition are substantially: That the writ of *habeas corpus* issued without warrant of law. It was denied that, in the absence of any suit between the spouses for divorce or separation from bed and board, the writ could legally issue, and that, in no event, could it issue to wrest an infant still at the mother's breast, as this child was alleged to be, from the care and keeping of the mother. That, in the granting of the writ, the judge exceeded his jurisdiction; that there was no remedy to the relatrix by appeal; and the supervisory powers of this Court were invoked to prevent an irreparable wrong.

Alternative writs were granted as prayed for.

The judge *a quo* justifies the issuing of the writ, and asserts his authority in the premises. It is unnecessary to set forth his answer in detail.

In the case of the State ex rel. Follet et al. vs. Rightor, judge, 32 An. 1186, which was a case of an application for a writ of prohibition, this Court held this language: "It is not a writ of right. 19 L. 167, 174; 27 An. 336; 29 An. 360. It is an extraordinary one, which can only issue where the court, having no jurisdiction, clearly usurps jurisdiction. C. P. 846; 4 An. 11; 16 An. 186; 32 An. 549, 553." Tested by this rule, it is plain to see that this is not a case that calls for our interposition through the writ in question.

There is not the least doubt that the judge *a quo* had jurisdiction over the subject-matter of the proceeding, and his action complained of is not arbitrary and shows no usurpation of authority. In granting the alternative writ, he but exercised a legal or judicial discretion in a matter over which his authority extended. Besides this, the bare apprehension of an injury does not authorize our interference. State ex rel. Hernandez vs. Judge, 33 An. 923. *Non constat* that the judge, after hearing the parties, may not discharge the writ and permit the relatrix to retain her child, at least during the tender years of infancy, whilst maternal sustenance and care are essential to his growth and health.

However this may be, under our construction of the supervisory power vested in this Court, and under the rules prescribed heretofore for its exercise, we cannot interfere with the regular course of the proceedings under the writ complained of.

For these reasons the preliminary order heretofore made is rescinded, and the application of the relatrix refused at her costs.

No. 6800.

A. PITOT, SEQUESTRATOR, ETC., VS. CHAS. F. JOHNSON ET AL.
BARTLETTE & RAYNE, INTERVENORS.

The shares of the capital stock of corporations are not "credits" within the meaning of the Code, and the pledge of such stock is perfect by the simple delivery of the Certificate of stock, without notice to the corporation

The principle is binding upon the Corporation itself, whatever its by-laws may provide to the contrary.

The maxim of *stare decisis* should apply in this case.

A PPEAL from the Fifth District Court for the parish of Orleans.
Rogers, J.

Alfred Grima for Plaintiff and Appellee.

Singleton & Browne for Interveners, Appellants.

The opinion of the Court was delivered by

FENNER, J. This case presents a contest over the value of forty shares of stock of the New Orleans Mutual Insurance Association, which stood in the name of Chas. F. Johnson & Co., between the following parties:

1st. Bartlette & Rayne, who claim by virtue of a pledge of the stock to them made by Johnson & Co. on *October 21st, 1873*, accompanied by delivery of the stock certificates.

2d. The plaintiff, Pitot, sequestrator, who claims by virtue of a seizure under *fi. fa.* of the stock in the hands of the corporation made in *December, 1874*.

3d. The New Orleans Mutual Insurance Association, which claims that, under a provision of its charter, its stock cannot be transferred "while any matured indebtedness to the association exists on the part of the holders," and that Chas. F. Johnson & Co. owes "matured indebtedness" to the amount of sixteen hundred dollars, evidenced by two notes in its favor, dated, one *October 26, 1873*, the other *November 21, 1873*.

It is conceded that the claims Nos. 2 and 3 above recited, both now enure to the benefit of the Insurance Association, and form double grounds upon which it claims the proceeds.

The judge *a quo*, in a learned opinion, held that, under article 3158, Rev. C. C., the certificates of stock being "credits not negotiable," the pledge thereof was not complete, as to third persons, by the mere delivery of the certificates, but required also the giving of notice to the "debtor," or corporation; and that no such notice of the pledge to Bartlette & Rayne having been given prior to plaintiff's seizure, the said seizure must hold the stock or its proceeds.

If the question were an open one, we should be disposed to affirm

the judgment of the court *a qua*, considering it to be based on a sound construction of article 3158 taken as a whole, and particularly of the last clause thereof. But since the date of that judgment, two decisions have been rendered by this Court holding that shares of stock were not credits, within the meaning of Art. 3158, and that a sale or pledge of the stock of an incorporated company, is, under article 3158, complete, even as to third persons, by the delivery to the vendee or pledgee of the certificates of stock, and that notice to the corporation is not necessary to the perfection of the sale or pledge or to protect the stock from seizure by the vendor's creditors, or from other rights of third persons arising subsequently to the sale or pledge. *Smith vs. Slaughterhouse Co.*, 30 An. 1378; *F. & T. Ins. Co. vs. Dry Dock Co.*, 31 An. 149.

These decisions confront us with a question of *stare decisis*, which must control our action in the present case. In the system of modern commerce, the sale and pledge of stocks form such important factors in financial operations, that it is of the utmost consequence that the legal mode of effecting such sales and pledges should be definitely ascertained and free from doubt. Since the rendition of these decisions, doubtless, a multitude of such transactions have been consummated in full reliance upon them, as a final settlement by the highest judicial arbiter of the law upon this subject. In such matters, a vacillating jurisprudence is more disastrous in its effects than even an erroneous one. We feel constrained, therefore, to accept and follow the decisions referred to. It results, necessarily, that the seizure under plaintiff's judgment could not prejudice or affect the rights of Bartlette & Rayne as pledgees. The same principle equally disposes of the claim of the Insurance Association based upon the provision of its charter above referred. Admitting the validity and binding effect of the provisions, it yet appears that, at the date of the pledge, the holder of the stock owed nothing to the corporation. If notice had been necessary to the validity of the pledge, and had been given, it would not be pretended that, *after* such notice, indebtedness of the stockholder, arising subsequently, could, in any manner, operate to the prejudice of the rights of the pledgee. But since it is held that, without notice, and by the mere delivery of the certificates, the pledge is binding as to the corporation and all third persons, it logically follows that the pledge fastens on the rights of the pledgor as they stood at the moment of the pledge and cannot be affected by subsequent transactions between him and the corporation.

A different question might present itself if the indebtedness to the company had existed at the date of the pledge.

Practically, it lies within the power of either party to protect himself. The corporation when about to permit a debt to be contracted by a holder of its stock for which it desires the protection of the clause in

State of Louisiana vs. Flint.

its charter, may secure the same by requiring the holder to produce his certificates of stock. The pledgee, when about to advance on the pledge and delivery of the certificates, may apply to the corporation for information as to the indebtedness of the pledgor to it.

For these reasons, it is ordered that the judgment appealed from be annulled, avoided and reversed, except that portion thereof which gives a personal judgment in favor of the intervenors and against Chas. F. Johnson & Co. and the members of said firm, which portion is hereby affirmed; and it is now further ordered, adjudged and decreed that Bartlette & Rayne have the right to sell the stock involved herein at public or private sale at their option, as stipulated in their act of pledge, and to be paid the amount of their judgment against defendants out of the proceeds of sale, by preference over all other parties; and that the New Orleans Mutual Insurance Association be condemned to allow them to transfer the said stock and make complete title to the purchaser; the costs of the lower court and of this appeal to be paid by the New Orleans Insurance Association.

No. 66.

THE STATE OF LOUISIANA VS. J. H. FLINT.

The accused having pleaded not guilty upon a first arraignment and, upon trial, the jury not agreeing and being discharged, a second arraignment took place, when the accused pleaded guilty and was sentenced by the Court: *held* that the proceeding was legal and that no formal withdrawal of the first plea of not guilty was necessary.

It is no more an open question in Louisiana that, in an Indictment under a statute providing a punishment for the commission of a common law offense, it is insufficient to charge the offense in the statutory terms alone, but all essential averments in an Indictment at common law for the same offense are necessary. Therefore, forgery being a common law offense, not defined in our statutes, and a felony at common law, the omission of the word *feloniously* in the Indictment vitiates the proceeding.

A PPEAL from the First Judicial District Court, parish of Caddo.
Taylor, J.

(This case was originally decided at the October Term, in Shreveport, and transferred to New Orleans, where the Decision on the Re-hearing was rendered.)

M. S. Crain, District Attorney, for the State, Appellee:

First—Felonies and misdemeanors, forming part of the same transaction, may be joined, as in larceny and conspiracy to steal. Whart. Crim. Pleadings, 8th ed. pp. 291, 295.

Second—It is not duplicity to couple successive statutory phrases in one count of an indictment. Whart. Crim. Pleading, 8th ed. § 251.

Third—Judgment will not be arrested on the ground that the offenses are distinct. *Ib.* § 251.

Fourth—A motion in arrest for duplicity cannot be sustained, duplicity is fatal on motion to quash or demurrer. *Ib.* § 760; 1 Bish. Crim. Pro., § 443 and note.

Fifth—By a plea of guilty, defendant confesses himself guilty in manner and form as charged in the indictment; formal defects in indictment are cured by this plea. *Ib.* § 413, 416; 1 *Bish. Crim. Pro.*, 3d ed. § 794, 5, 8.

Hicks & Hicks for Defendant and Appellant:

First—A jury in a case of felony cannot be discharged without a verdict, unless it is clearly apparent, after sufficient trial, that they cannot agree.

Second—An arraignment and plea of guilty cannot be allowed when defendant has been arraigned and pleaded not guilty, when there was no withdrawal of the first plea, and, therefore, the sentence in this case is illegal. 1 *Chitty's Crim. Law*, 434, 437; 1 *Bishop's Crim. Pro. Secs.* 748, 750; 2d *Yerger's R.* 248; 1 *Bishop's Crim. Pro.* 124, 801, 798.

Third—A jury in a case of felony cannot be discharged without a verdict, in the absence of the defendant, who is in jail. 30 *An.* 368; 1 *Chitty's Crim. Law*, 663; 1 *Bishop's Crim. Pro.* 271.

Fourth—Forgery and uttering a forged order cannot be joined in one count of the indictment. They are distinct, and different offences and require different punishments. 3 *G. E. Sec.* 104; *Arch. Crim. Pl.* 287, 288, 294; 2 *Bishop's Crim. Law, Sec.* 604-6-7, 548, *R. S.* 976; 3 *Chitty's Crim. Law*, 1031; 2 *Bishop's Crim. Law, Sec.* 609; *R. S. Sec.* 833, 835; and is fatal in arrest of judgment. 30 *An.* 571; 32 *An.* 573; 30 *An.* 313; 32 *An.* 574; 11 *An.* 648. Plea of guilty does not cure the defect. 1 *Bishop's Crim. Pro. Sec.* 795; 6 *Texas*, 334; 1 *Bishop's Crim. Pro. Sec.* 798. An indictment for forgery and uttering a forged order which were felonies when the punishment was affixed in *R. S.* 833 and 835, must contain the word "feloniously." 1 *Chitty's Crim. Law*, 242; 20 *An.* 145, 409; 8 *R.* 547, 601-2; 30 *An.* 846; 8 *An.* 114; 6 *An.* 405; 12 *An.* 383.

The opinion of the Court was delivered by

LEVY, J. Defendant was indicted by the grand jury of the parish of Caddo for the crime and offence of forgery. He pleaded guilty and was sentenced by the Court to imprisonment at hard labor, in the State penitentiary, for the term of two years, commencing from date of incarceration therein. When first arraigned, the prisoner pleaded not guilty and put himself on trial by a jury, and owing to the inability of the jury to agree, there was a mistrial. Two days afterwards, the prisoner was again arraigned and pleaded guilty, under which plea he was sentenced as aforesaid.

There were motions for a new trial and in arrest of judgment, both of which were overruled for the reasons given by the judge *a quo*, which are found in the record. We also find an assignment of errors filed in this Court.

The motion for a new trial is based upon the averment that the verdict of the jury is contrary to the law and the evidence; that in arrest of judgment, 1st. "that the indictment charges distinct and separate crimes and offenses against the defendant in the same and only count, which crimes and offenses require different punishments, provided by different statutes." 2d. "The indictment charges that defendant did counterfeit and forge a certain order, which crime is punished, under the Revised Statutes, Sec. 833, by imprisonment, at hard labor, for not less than two years nor more than fourteen years; and, in the same count, it is charged that he did utter, put-off and publish as true the same

order, which crime is punished, under the Revised Statutes, Sec. 835, by imprisonment, at hard labor, not more than ten years, and not less than two years; and the indictment is for two distinct and separate offences and is bad for duplicity;" 3d. "Neither of the offenses are charged to have been committed feloniously, though they are common law offenses;" 4th, "If they are statutory offenses, the indictment does not charge either offense in the words of the statute or in equivalent words; 5th. "The court cannot, under the verdict and the charges in the indictment, apply any punishment applicable to the charges."

We do not think the first ground urged in this motion is tenable, inasmuch as two distinct offenses, i. e., the offense denounced in section 833, R. S., and that in 835, are not charged in the indictment. Sec. 833 reads: "Whoever shall forge or counterfeit, or falsely make or order, or shall procure to be falsely made, altered, forged or counterfeited any (* * * *) order, acquittance or discharge for or upon the payment of money or delivery of goods, (* * * *) or shall alter or publish as true any such false, altered, forged or counterfeited (* * * *) order (* * * *) with intent to injure or defraud any person, (* * * *) on conviction, shall be punished by imprisonment, at hard labor, for not less than two nor more than fourteen years." Sec. 835 reads: "Whoever shall utter or tender in payment, as true, any false, altered, forged or counterfeited note, certificate, check or bill of any debt of this State, bank bill, check or promissory note, payable to the bearer by any bank, knowing the same to be false, altered, forged or counterfeited, with the intent to injure or defraud this State, any body politic or corporate, or any person, shall, on conviction, be imprisoned at hard labor, not exceeding three years, and fined not exceeding two thousand dollars."

It is true these two sections define entirely different offenses, but the indictment does not charge them. It is charged in this indictment, that the prisoner "wilfully, falsely, and fraudulently, did counterfeit, forge, utter, put-off and publish as genuine, one certain order for goods and supplies, (* * * *) with intent to defraud said Weiler, to the great damage of said Weiler," &c. Thus, the indictment does not charge the offense contained in Sec. 835, which describes an offense different from that in Sec. 833, and prescribes a different punishment.

The offense of forging, counterfeiting, and falsely making, &c., an order for the delivery of goods, and that for publishing as true any such false, altered, forged or counterfeited order, are embodied in the same section by means of the conjunction *or*, and are conjunctively set forth in the only count of the indictment.

The questions to be decided are, then : Does this constitute duplicity and is it a fatal defect and, if so, is it cured by verdict ?

Counsel for defense cites the case of *State vs. Palmer*, 32 An. 565, and relies upon it in support of his motion. The doctrine therein enunciated was based upon entirely different facts and is by no means applicable to the case at bar. In the *Palmer* case we held that "the indictment should have been confined to the provisions of Sec. 907 R. S., instead of which it has been extended to those of section 905, which applies to other and distinct cases of embezzlement and breach of trust. Thus, in this indictment, in this (*Palmer's*) case, there are grouped in each count the offenses described in these two different sections, which define different and distinct classes of offenses. *For that reason*, the indictment in both its counts, is bad for duplicity and defective for uncertainty." In *State vs. Adam et al.*, 31 An. 719, the Court held: "Several offenses, distinct in kind and degree, cannot be included in the same count, but this rule does not apply to cumulative offenses denounced in the same clause or section of a criminal statute. Such clause or section may, and often does, enumerate several offenses linked to the same act, or enumerate disjunctively the intent necessary to constitute each of the offenses, and in such cases, they may be charged conjunctively in one count." Also, "This prosecution is under Rev. Stats., section 794, and reads: Whoever shall with a dangerous weapon, or with intent to kill, inflict a wound less than mayhem upon another person, shall, on conviction, etc. The crime thus denounced was charged conjunctively and cumulatively and the indictment is not amenable to the objection urged by the prisoner, which applies to a different class of cases." In *State vs. Markham*, 15 An. 498, the same rule is clearly stated. See, also, 2 An. 837, 838; 4 An. 32; 14 An. 668; 40 Maine, 592; 36 N. H. 359; Wharton, *Crim. Law*, pp. 81, 98; Starkie, *Crim. Pl.* 271; Wharton, *Crim. L.* (3d ed.) 172, 173, 188, 203-4; Lewis, *Am. Cr. Law*, p. 303.

We adopt the ruling and reasons of the District Judge on defendant's objections that the offenses are not charged to have been committed feloniously, and the offense is not charged in the words of the statute, or in equivalent words, in which he is fully sustained by the authorities cited by him. 9 An. 106; Voorhies' *Crim. Jurisp.* p. 391, No. 78; 13 An. 243; 1 Bish. *Cr. Pr. and Pl.* § 535, 536; 30 An. 814. See, also, Wharton, *Am. Cr. Law* (3d ed.), 194, 189, 190. His ruling, also, on the fifth objection in the motion, that "the court cannot, under the verdict and the charges in the indictment, apply any punishment applicable to the charges," is also in full accordance with our views as hereinbefore expressed.

The assignment of errors has been considered by us and we find nothing which would justify the reversal of the judgment. The District Judge exercised the discretion vested in him when he discharged the jury on the first trial, on its failing to agree upon a verdict. 7 An. 518.

The prisoner had the indisputable right to plead guilty on his second arraignment and this plea was *ipso facto* a withdrawal of his former one. The mere absence of the formality of a written or even verbal withdrawal *ipsissimis verbis* cannot vitiate the proceedings.

We think that the objections urged as to the proceedings had on the first trial, are not such as we should or can properly inquire into or discuss. The second trial is all with which we have anything to do. The accused stands upon his plea of guilty and the proceedings under and growing out of that plea and the validity of the indictment, which charged the offense, are the only subjects and questions for our consideration.

The judgment of the lower Court is affirmed with costs.

ON REHEARING.

FENNER, J. We granted a rehearing in this case, exclusively on the ground of the insufficiency of the indictment, by reason of the omission of the word "feloniously" in the description of the offense charged.

A review of the authorities has convinced us that we were in error in overruling this objection. It seems to be no longer an open question in the jurisprudence of this State, that in an indictment under a statute providing a penalty for the commission of a common law offense, it is insufficient to charge the offense in the statutory terms alone, but all essential averments in an indictment at common law for the same offense will be deemed necessary here: *State vs. Thomas*, 29 An. 601; *State vs. Curtis*, 30 An. 814; *State vs. Cook*, 20 An. 145; *State vs. Durbin*, 20 An. 408; 8 R. 590; 10 An. 195, 698; 5 An. 324.

The defendant here was indicted under a statute punishing the offense of *forging*, without defining what forgery is. Forgery was a common law offense, and we must look to the common law for the definition of what it means under the statute. Whatever was essential to the description of that offense in an indictment at common law, is essential here.

Forgery was a felony in England in 1805. 3 Chitty's Cr. L., 1031.

The absence of the word "feloniously" from an indictment for forgery at common law would have been fatal. It is equally so here. See authorities above quoted; also Wharton, Am. C. L. §§ 399, 372, 1607, 1612, 1613.

It is, therefore, ordered that our former decree herein be annulled and set aside, and it is now ordered, adjudged and decreed that judgment and sentence appealed from be annulled, the indictment quashed as not good in law, and that the defendant remain in custody subject to the orders of the District Court of the parish of Caddo.

The Chief Justice takes no part in this decision, having been absent when the case was submitted.

No. 8383.

THE STATE OF LOUISIANA EX REL. JOSEPH TYRRELL VS. THE JUDGE OF THE
FIFTEENTH JUDICIAL DISTRICT COURT, PARISH OF POINT COUPEE.

When a judge is recused on account of interest in the cause, he cannot himself decide the issue raised on that point by his denial, but must refer it, to be tried as provided by law.

APPPLICATION for writ of Prohibition.

Robert Semple, District Attorney, and *O. O. Provosty*, for Relator.
John Yoist, Judge, Respondent.

The opinion of the Court was delivered by

TODD, J. On the 28th of October, 1881, the relator obtained a judgment before a justice of the peace, in the parish of Point Coupee, against one Mac Johnson, for sixty dollars and interest. From this judgment the defendant in the case appealed to the District Court of said parish, presided over by the Hon. John Yoist, defendant in the present proceeding.

After the appeal was filed in the appellate court, the relator's attorney filed an exception alleging that the District Judge, Hon. John Yoist, had a personal interest in the result of the suit, and moved for his recusation. The judge having refused to recuse himself, and the relator fearing that he would proceed to try the case and pronounce judgment therein, applied to this Court for a writ of prohibition, to restrain him from further proceedings. An alternative writ having been granted, the defendant judge has made answer, and denies having any interest in the case.

The Code of Practice, Art. 337, defines recusation thus :

"Recusation is the refusal on the part of the defendant to have his cause tried by the judge before whom he has been sued, on account of the ties of relationship existing between such judge and the plaintiff, or for other just causes hereafter expressed."

Among other causes expressed, is that of a judge being interested in the cause. For such cause, either party may challenge or move the recusation of the judge.

When a refusal has thus been made to the judge's trying the cause, on account of interest, that refusal must be respected by the judge. He must either admit his disqualification and enter up the order of recusation or deny it, and thereby raise an issue touching his right to try the case. If he pursues the latter course, it is plain to see that he could not legally decide that issue himself. Assuming that he is interested—as charged—that interest would prompt him to declare himself *not* inter-

ested, as much as it would move him to follow that interest in the judgment he would render in the cause. Hence, it is not enough for the judge to disavow an interest, but, where such disavowal is not satisfactory to the party making the challenge—as in the present case—and he insists upon showing such interest in the judge, it evinces an unwarranted exercise of authority in this officer to assume to determine this question, so exclusively personal to himself and affecting his own competency. He should at once recuse himself on this issue and refer it to be tried in the manner pointed out by law. If on such trial, the ground of recusation is shown untenable and the competency of the judge to try the case decreed, then, and not till then, is the judge authorized to proceed in the case.

To hold otherwise, would be to render this important right of recusation or challenge nugatory and worthless.

From this it clearly follows, that the trial and overruling of the exception by the defendant judge touching his recusation, and any and all other proceedings thereafter are null and void.

For these reasons, the writ of prohibition is made peremptory at the cost of the defendant.

No. 8304.

THE STATE OF LOUISIANA VS. THOMAS RICHARDS.

An indictment is not bad for duplicity, in charging conjunctively in the same count, both an offense and the intention of committing the same, when the two are denounced disjunctively in the statute. This is not an open question any longer.

A PPEAL from the Ninth Judicial District Court, parish of Tensas.
Hough, J.

J. C. Egan, Attorney General, for the State, Appellee:

First—It is immaterial whether the exact language of the statute be used or not, so the accused be informed of the exact nature of the charge against him. All unnecessary allegations will be considered as surplusage. Arch. Crim. P. and P., vol. 2, p. 14; Sec. 394; Wharton's Crim. Law; Bishop on Criminal Procedure, vol 1, Sec. 478.

Second—Cumulated charges in a statute may be cumulated in a count of an indictment or information, and if all the cumulated charges be proved, there is but one offense committed. Wharton's Crim. Law, 4th ed., Sec. 390; Bishop on Criminal Procedure, Secs. 434, 435 and 436; Bishop on Statutory Crimes, Sec. 383, p. 254.

Third—An objection to the information for duplicity must be made by special plea, or in a motion to quash; the defect in the information is cured by the verdict. Bishop on Crim. Pro., 2d ed., Sec. 442; Arch. Crim. P. and P., vol. 1, p. 315, note; Wharton's Crim. Law, 4th ed., Secs. 395 and 3043; Voorhies' Crim. Jurisprudence, Sec. 76, p. 389.

L. V. Reeves and Jno. H. Halsey for Defendant and Appellant.

First—That the information charges no specific offense under our law.

Second—That the information is defective and should be quashed for duplicity and uncertainty, as it contains two or more offenses, if offenses, in one count.

The opinion of the Court was delivered by

TODD, J. The defendant is appellant from a sentence condemning him to six months imprisonment at hard labor in the penitentiary.

The information on which he was tried, charges that the accused "did, with a dangerous weapon, to wit, a knife, and with intent to kill, feloniously assault one Allen Parker, and did inflict wounds less than mayhem upon the person of him, the said Allen Parker."

The section of the Revised Statutes on which this prosecution was instituted (Sec. 794) reads as follows: "Whoever shall with a dangerous weapon, or intent to kill, inflict a wound less than mayhem upon another person, shall, on conviction, be imprisoned not exceeding two years," &c.

The accused was tried by a jury, and, after a verdict of guilty, moved to arrest the judgment on the following grounds:

1. That the information charged no offense provided for by the statute.

2. That, if an offense is charged, there is duplicity in joining two different offenses in the same count of the information.

There is certainly an inconsistency and contradiction in first alleging that no offense is charged and, then, that two distinct offenses are charged in the information.

However that may be, the first ground is not pressed, and a mere glance at the information shows there is no force in it.

The only real question presented, is that contained in the second ground—that of duplicity—and this question has been so frequently adjudicated upon that it is no longer an open one.

The rule on this subject is thus laid down in a decision of this Court: "In penal statutes, when the statute enumerates several offenses connected with the same transaction or the intent necessary to constitute such offense disjunctively, they may be alleged conjunctively in one count; and in that event must be charged in the indictment conjunctively." *State vs. Markham*, 15 An. 498; *State vs. Fant*, 2 An. 837; *State vs. Palmer*, 32 An. 565; *Wharton on Criminal Law*, Sec. 390; *Bishop on Criminal Procedure*, Secs. 434, 435, 436.

The accused is here charged with inflicting a wound less than mayhem with a dangerous weapon—a knife—and with intent to kill. The offenses charged, if they can be construed as two offenses, are "connected with the same transaction"—in fact, constitute but one act, and

Calhoun and Husband vs. Levy et'als.

were properly charged conjunctively in the information. The case falls strictly within the repeated rulings and authorities cited above. Though the offense was not charged in the exact language of the statute, it was substantially so charged, and the slight difference is mere surplusage. The case referred to, *State vs. Johns*, 32 An. 812, and relied on by defendant's counsel, is not in point. In that case, two offenses created by two different statutes, imposing different penalties, were joined in the same count.

Judgment affirmed.

No. 8161.

M. M. ADA CALHOUN AND HUSBAND VS. LIONEL L. LEVY ET ALS.

A mere auxiliary proceeding, by which a third person comes in by way of injunction, to protect his property from being seized and sold under a judgment to which he was not a party, is not removable, under the Act of Congress of March 3d, 1875, from the State to the Federal Court. Affirming *Watson vs. Bondurant*, 30 An. 1.

Under the laws creating the Parish of Grant, a judgment previously rendered by the District Court of the Parish of Rapides, cannot be revived by the same Court. It is the Court of the Parish of Grant, to which the suit, in which the judgment was originally rendered, is transferred, that has jurisdiction of the revival.

Article 3547, C. C., under which judgments are revived, did not provide an exclusive mode of preventing the prescription of such judgments. Affirming 30 An. 1071.

It is urged on the Rehearing that the citation in the revival suit, though brought before an incompetent court, interrupted the prescription of the judgment. The Court does not pass upon this point and leaves the parties at liberty to raise the issue in some other proceeding, but strikes from its original decree that portion which sustained the plea of prescription.

APPPEAL from the Twelfth Judicial District Court, parish of Grant.
Barbin, J.

J. P. Hornor and Francis W. Baker for Plaintiffs and Appellees:

An application for removal of a cause made in due time and in due form, under the Act of Congress of 1875, by a citizen of another State, should be granted.

Unless one have an actual and real interest which he pursues, he cannot be heard attacking the title of another. Code of Practice, 15.

A judgment rendered by the District Court for the parish of Rapides, in 1868, against one residing in that portion of the parish, afterwards made a part of Grant parish, could only be executed or revived after the parish of Grant was organized by the District Court of the parish of Grant. Act 82 of 1869. Act 26 of Extra Session 1870. Act 39 of 1871. Act 78 of 1873. *Hammett vs. Sprowl*, 31 An. 325; 32 An. 309.

Any attempted revival of such a judgment by the District Court of the parish of Rapides, after the organization of Grant parish, was void, the Court being *coram non judice*. Same authorities.

If the District Court of Grant was not given jurisdiction over such cases, still the District Court of Rapides, having been divested of all jurisdiction thereover, there is a *casus omnisus* with respect to such cases, which the Legislature alone could have supplied. *Chapman vs. Nelson*, 31 An. 347.

Calhoun and Husband vs. Levy et als.

Judgments not revived in accordance with C. C. 3547 (R. S. 2813), are prescribed by the lapse of ten years.

A judgment rendered by a court without jurisdiction, is absolutely void, and such nullity may be set up by any person, whenever and wherever it is sought to be enforced. 23 An. 779; 26 An. 127; 28 An. 744; 24 An. 277; 27 An. 630.

R. J. Bowman and *R. A. & R. P. Hunter* for Defendants and Appellants:

The Court which rendered the judgment, sought to be revived, is that which has jurisdiction of the suit to revive. C. C. Art. 3547, Act 1853, §250.

The jurisdiction is unchanged by the change of residence of the debtor to another parish, or by the creation subsequent to the rendition of a judgment of a new parish carved out of the territorial jurisdiction of the original court, in which new parish the debtor resides. 23 An. 594; 27 An. 51; 30 An. 961; 31 An. 346.

The expressions contained in the Acts of 1869, No. 82, creating the parish of Grant, and the amendatory Act of 1870, No. 26, do not vest the District Court of the parish of Grant with the jurisdiction to revive a judgment rendered by the District Court of the parish of Rapides, out of which the parish of Grant was created.

A suit to revive a judgment, is merely incidental to the original suit, "a graft upon it" must be brought in the Court which rendered the judgment, and cannot be removed to the U. S. Circuit Court. *Bank vs. Turnbull*, 16 Wall. 190; *Barrow vs. Hunlongg*, U. S. 80.

The judgment of revival cannot be attacked upon the ground, that the Court, which rendered it, had no jurisdiction, when the debtor himself on whom citation was served, raised no such question, but by making default, joined issue in the suit to revive and against whom on that issue judgment has been rendered.

Nor can the vendee, in a simulated sale by the debtor, raise any question as to the validity of the judgment and judicial mortgage against the debtor; if the sale is simulated, the vendee is without interest. 2 An. 367; 30 An. 947; 2d H. D., p. 1031, No. 1.

Miller, Finney & Miller on same side, on the rehearing:

First—The citation from an incompetent court interrupts prescription on the action to revive. O. C. 3518.

Second—Whether *liberanda* or *acquirendi causa*, citation from an incompetent court interrupts. C. C. 3351.

Third—The prescription of judgments is found in the Code under the head of prescriptions *liberanda causa*; it is subject to the general rules of prescription, and is like other prescriptions liable to be interrupted by citation from an incompetent Court. Succession of Patrick, 30 An. 1071.

Fourth—Prescription is predicated on an abandonment presumed from the silence of the party. Troplong, de la Prescription, vol. 1, p. 344.

Fifth—Such a presumption does not obtain where one has sought by action to judicially enforce his rights.

Sixth—Our Courts have pushed the principle to the point of holding that even a defective citation interrupts. The theory upon which the doctrine rests, is that non-action not erroneous action gives rise to the presumption of abandonment. *Satterly vs. Morgan*, 33 An. 849.

Seventh—If citation from an incompetent court does not interrupt prescription of the action to revive, a judgment creditor is alone submitted to a rigorous and exceptional rule not written in the laws, and entailing on him a punishment for an error of legal judgment which is visited on no other creditor.

Eighth—He is therefore in consequence of the judicial recognition of his debt a judicial outcast—debarred of a protection given to every other form of debt, even an unliquidated and open account.

Calhoun and Husband vs. Levy et als.

The opinion of the Court was delivered by

LEVY, J. On the 24th of November, 1868, Lionel L. Levy obtained judgment in the District Court of the parish of Rapides against Meredith and William S. Calhoun for the sum of \$5250, with eight per cent per annum interest thereon from 1st of February, 1867. On the 7th of June, 1878, at the suit of said Levy, this judgment was revived by judgment of the District Court of the parish of Rapides and the original judgment was reinscribed and that of revival inscribed in June and September 1868. On the 7th of May, 1873, an act was passed before Andrew Hero, notary public, in which it was declared that William S. Calhoun sold to his sister, plaintiff herein, for the consideration of thirty-five thousand dollars, his entire interest in the succession of his mother. Levy, treating this sale as a simulation, had execution issued on his judgment, directed to the sheriff of Grant parish, and seized thereunder certain property embraced in the sale of W. S. Calhoun to his sister, as the property of said W. S. Calhoun, and the same was advertised for sale. The plaintiff, M. M. Ada Calhoun, and her husband, G. W. Lane, sued out a writ of injunction restraining the sheriff from making the advertised sale, alleging her ownership of the property seized and averring that Levy's judgment was improperly revived in the parish of Rapides, and that it is prescribed, and also that the "judgment has never been recorded and reinscribed and no longer bears upon the property." Defendant, in his answer to plaintiff's petition, made a general denial, and specially averred the facts of the rendition, recordation, revival and reinscription of his judgment, and the regularity and legality of all those proceedings. He specifically charged that the conveyance from the brother to the sister was "unreal, fraudulent and simulated, and intended to cover up the property; that W. S. Calhoun at the time was largely in debt and the parties had signed a counter-letter showing the said sale to be unreal and simulated," prayed for twenty per cent general and \$550 special damages, that said sale be decreed to be fraudulent and simulated, and for dissolution of the injunction, etc.

On the same day upon which this answer was filed, plaintiff filed a petition, affidavit and bond for the removal of the cause to the United States Circuit Court for the District of Louisiana, on the ground that her husband, G. W. Lane, was a citizen of Dutchess County, State of New York, and that the controversy in this suit was and is wholly between herself and husband, citizens of New York, and L. L. Levy, a citizen of this State. To this petition for removal defendant answered, denying the citizenship of either plaintiff to be in New York, and averring that they are both citizens of Louisiana; he alleged that they have by their injunction suit sought the jurisdiction of the State court, and cannot now decline it, and that they cannot remove an injunction suit—a

mere auxiliary proceeding, and that W. S. Calhoun, under the allegations of defendant's answer, is a necessary party to the controversy, and that he is a resident of Grant parish, where the suit is now pending. At the September term of court there was a continuance granted, and at the next, December term, defendant filed a peremptory exception, alleging that the petition disclosed no cause for removal, this being an injunction suit, which could not originally have been brought in the United States Circuit Court, and could not be removed to that court from the State court. This exception was sustained by the District Judge, and the application for removal denied.

We will first consider the correctness of the ruling of the court *a qua*, denying the application for removal.

The question involved is settled in the case of *Watson vs. Bondurant*, 30 An. 1, where it is held that a mere auxiliary proceeding, by which a third person comes in by way of injunction, to protect his property from being seized and sold under a judgment to which he was not a party, is not removable, under the Act of Congress of March 3, 1875, from the State to the Federal court; and in commenting on the case of *Bank vs. Turnbull*, 16 Wallace, 190, this Court said: "If, therefore, the proceeding on the part of *Turnbull & Co.*, by whatever name it may be called, was not removable under the act of 1867, as the court expressly decided it was not, it is because a *suit* means an original suit, not an auxiliary, dependent, supplementary proceeding; by which a third person interferes to prevent the sale of his property, seized under execution, in satisfaction of a judgment in the original suit, to which he was a stranger. If such a proceeding was not a *suit*, within the meaning of the act of 1867, and, therefore, was not removable, there is no logic by which it can be shown that the proceeding on the part of *Watson* in this case is any suit of a civil nature, at law or in equity, within the terms of the act of 1875, and that is, therefore, removable under that act." *Goodrich vs. Hunton*, 29 An. 372; 4 Cranch, 169; 1st Otto, 254. The application for removal was, in our opinion, properly refused.

There remains to be considered whether the judgment, under which the execution was issued and the seizure made, was legally obtained in a court having jurisdiction, and whether the original judgment has been prescribed for want of proper revival.

It is contended by defendant that the court which rendered the judgment, sought to be revived, is that which has jurisdiction of the suit to revive; that the jurisdiction is unchanged by the change of residence of the debtor to another parish, or by the creation, subsequent to the rendition of a judgment, of a new parish carved out of the territorial jurisdiction of the original court, in which new parish the debtor resides; and that the expressions contained in the Acts of 1869, No. 82,

creating the parish of Grant, and the amendatory Act of 1870, No. 26, do not vest the District Court of the parish of Grant with the jurisdiction to revive a judgment rendered by the District Court of the parish of Rapides, out of which the parish of Grant was created.

It is true that, under the Act of 1853, No. 274, the citation to a judgment debtor, in an action of revival, is required to be issued from the court which rendered the judgment; but this right or authority may be vested by statutory enactment in courts other than those which rendered the judgment, and within whose territorial jurisdiction the judgment debtor may reside, as was distinctly held in the case of *Hammett vs. Sprowl*, 31 An. 325. Let us see if this right and jurisdiction have in the present case been conferred upon the District Court of the parish of Grant, of which the judgment debtor is a resident, and within whose territorial limits he resided when the original judgment was rendered. Section 8 of Act No. 82, of session of 1869, (under which act the parish of Grant was created) provides: "That it shall be the duty of the clerks of the parishes of Winn and Rapides, immediately after the passage of this act, to transmit to the clerk of the District Court for the parish of Grant, all petitions, answers, documents and papers appertaining to suits wherein the defendant or defendants reside within the parish of Grant."

Act No. 26 of the extra session of 1870, amending the act of 1869, creating said parish, further provides: "That it shall be the duty of the clerks of the District Courts of the parishes of Rapides and Winn, immediately after the passage of this act, to transmit to the clerk of the District Court for the parish of Grant, all petitions, answers, documents and papers appertaining to suits wherein the defendant or defendants reside within the parish of Grant, and also all petitions, orders, bonds and other papers relating to successions, if the administrators thereof reside and the property of such succession be situated in the parish of Grant, and also all papers and matters relating to the tutorship of minors, wherein they, or a majority of them, reside in the parish of Grant; copies of all such suits or papers to be retained in the office of the clerks of the District Courts of the parishes of Rapides and Winn, and the original sent to the parish of Grant. All suits, any successions, whether judgment be rendered therein or not, are to be transmitted, in accordance with this act."

Section 2 of this act, imposes a fine upon the clerk refusing or neglecting to *transfer* said suits, papers, etc., within thirty days after the promulgation of the act. Section 4 enacts: "That all actions taken and judgment rendered after the passage of this act to establish the parish of Grant, dated 4th of March, 1869, shall be null and void, and consent shall not take away the jurisdiction of the court to try such cases contrary to this act, except when there is an equal number of

the heirs and value of the property in each parish as the case may be; then it shall be settled by the courts, if the heirs disagree."

The wording and phraseology of this act is neither elegant nor perspicuous, but a careful consideration of all its features and taking the various sections in context, enable us to arrive at its unmistakable meaning and intention.

The case of Hammett vs. Sprowl, above referred to, was a suit for a revival of a judgment rendered by the District Court of the parish of Natchitoches, the defendants residing in the parish of Red River. The revival suit was brought in Red River. The law, under which the District Court of Red River took jurisdiction of the suit, is Act No. 78 of 1873, which reads: "It shall be the duty of the clerk of the district and parish courts of Bienville, Bossier, DeSoto, Caddo and Natchitoches, to transmit forthwith to the clerks of the district and parish courts of the parish of Red River, all petitions, answers, documents and papers, appertaining to suits wherein the defendant or defendants reside within the parish of Red River, whether said suits be settled or unsettled; and also it shall be their duty to likewise forthwith transmit as above, all mortuary proceedings had in successions where the deceased died within the limits of the parish of Red River, or where his principal property is situated therein." Section 2: "The district and parish courts of the parish of Red River shall have as full and complete jurisdiction over the suits and successions so transferred, as the said courts of the different parishes from whence the same were transferred as now under the law."

In construing this statute, the Court in that case said: "We have quoted the statute which expressly gives to courts of Red River, jurisdiction over the suit sought to be revived in this case. It puts the Red River court in the place and stead of the Natchitoches court, vesting it, as regards this judgment, with the jurisdiction of the latter. Now, what was, under existing laws, the power of the Natchitoches courts as regards this judgment? It was the exclusive right to *enforce* and to *revive* it. After the passage of that statute the court at Natchitoches could no more revive that judgment than it could enforce it by *fi. fa.* We regard a proceeding to revive a judgment not as a new suit, but simply as a proceeding in the same suit, to continue and keep alive a judgment rendered therein, and to furnish proof that it has not been satisfied or extinguished. But, if it were considered to be a new and substantive suit, it is manifest that it would have to be brought in Red River, where all the defendants reside. So, taking either horn of the dilemma, the result is the same."

The act relating to the parish of Grant requires "all suits, any successions, whether judgment be rendered therein or not," to be transmitted from the parishes of Rapides and Winn to Grant, where the

defendants reside, or the property of successions, etc., is situated in the latter. The word transmit was evidently regarded by the law-makers, as affects this act, as being synonymous with transfer, for, in the second section, they say that the District Judge shall "fine said clerk so refusing or neglecting to transfer said suits, papers," etc.

Now, what is the legal and accepted signification of the *transfer* of suits, etc.? It involves the jurisdiction, control, direction, necessary proceedings to be had to carry them to definitive settlement, to full and complete satisfaction. It will hardly be contended that pending suits and unsettled successions were merely to be transmitted to the courts of Grant parish and there held for safe-keeping, while the court of that parish would be powerless to take any action in them; that the papers and documents themselves were to be kept by the clerk and the suits and successions committed to a dead docket, whence they could not be taken for adjudication or decision. The act of 1870, in our opinion, removed all the causes, suits and successions, falling under the conditions mentioned therein, from the parish of Rapides; divested the courts of that parish of all further jurisdiction and control over them, and substituted the parish of Grant, as to such jurisdiction and control, in the stead of the parish of Rapides, vesting the former with all the jurisdiction, authority and judicial power which, before the passage of that act, had attached to the Rapides court.

The judgment of revival being null, the plea of prescription was properly maintained and the injunction properly perpetuated. Under this view of the case, the question of simulation raised by the defendant herein, whose claim as a creditor has been extinguished, cannot be considered in this action between the parties hereto.

The judgment of the lower court is affirmed with costs.

ON APPLICATION FOR REHEARING.

POCHÉ, J. After a mature consideration of defendant's application to reopen this cause, it is ordered that a rehearing be granted in the case, exclusively on the following question: whether prescription on defendant's judgment was interrupted by service of the citation for the revival of said judgment, issued by the District Court of the parish of Rapides.

ON REHEARING.

FENNER, J. We granted a rehearing in this case solely upon the question of prescription of defendant's judgment.

The substantive relief sought by plaintiff in her suit herein, was a perpetual injunction against further proceedings under a writ of *feri facias* issued upon the judgment of defendant, Levy, against W. S. Cal-

houn. This is the sole prayer of her petition. One of several grounds upon which that relief was based, was the charge that the judgment referred to was prescribed; but there were other grounds ample to maintain the relief—notably, that the judgment was more than ten years old and had never been revived. We held that the proceeding and judgment of revival were absolute nullities, because taken in a court having no jurisdiction over the question, and that the judgment, therefore, had not been revived. This was, of course, sufficient to sustain the injunction restraining the execution.

Defendant, however, in his answer affirmed the validity of his judgment and of the proceedings of revival, and prayed for judgment dissolving the injunction with damages, declaring the title of plaintiff to the property seized to be fraudulent and simulated, and that he be permitted to proceed with its sale under his *fi. fa.* To this demand, the plaintiff filed a plea of prescription to the judgment relied on by defendant, and excepted peremptorily, on the ground that defendant not being a creditor and having no lien or mortgage on the property, had no right or interest to attack the title of plaintiff.

The final judgment decreed that the writ of injunction be maintained and perpetuated, and "that the plea of prescription filed by the plaintiff to the judgment and claim of the defendant be sustained." Our former decree affirmed this judgment. Defendant claims that he is injured by that portion of the judgment which maintains the plea of prescription, because it would operate as *res judicata* against him in a subsequent action to revive his judgment, contending that the prescription of his judgment, and of his action to revive the same, was interrupted by the citation issued and served in his former revival suit, although brought before an incompetent court.

If the prescription of judgments and of actions to revive them, is subject to the same modes of interruption as apply to prescription of all other rights and actions, it is clear that citation even before an incompetent court, does operate such interruption. C. C. 3518, 3551.

It has been held by our predecessors that the statute of 1853, now Art. 3547, did not provide an exclusive mode of preventing the prescription of judgments, but left such prescription subject to all the other modes of interruption provided by law. Succession of Patrick, 30 An. 1071.

We fully concur in the doctrine of that case. The act of 1858, now embodied in Art. 2278 C. C., provides that "parol evidence shall not be received to prove any acknowledgment or promise to pay any judgment, sentence or decree of any court, in or out of the State, for the purpose or in order to take such judgment, sentence or decree out of prescription, or to revive the same after prescription has run or been com-

pleted." It is impossible to reconcile this article with the theory that the mode provided in Art. 3547, is exclusive of other modes of interrupting the prescription of judgments.

If, then, the prescription of this judgment was interrupted by the citation heretofore referred to, the action to revive yet lies under the very terms of the proviso of Art. 3547, which says: "Any party interested in any judgment may have the same revived *at any time before it is prescribed*, by having a citation issued according to law," &c.

We find it unnecessary, in this case, to pass upon the plea of prescription at all, and shall not do so; but the foregoing considerations demonstrate the propriety of annulling that portion of the judgment appealed from which maintains the plea, leaving parties at liberty to raise that issue in any suit which may hereafter be brought to revive the judgment. Nor, in thus changing our former decree, shall we mulct the plaintiff in the costs of the appeal. The maintenance of the plea of prescription was, in effect, merely a reason for rejecting the reconventional demands of defendant; and as our decree, as amended, will sustain the entire relief sought by plaintiffs, and will not allow any of the counter-relief sought by defendant, the judgment appealed from remains substantially unchanged. We adopt this course the more readily, because, as this particular question of interruption of prescription was never suggested in this Court until presented in the application for rehearing, we may fairly presume it was not urged in the court *à quâ*, and the plaintiff is, therefore, to blame for the error.

It is, therefore, ordered that our former decree herein be annulled and set aside; and it is now ordered, adjudged, and decreed that the judgment appealed from be amended by striking therefrom that portion which sustains the plea of prescription filed by the plaintiff to the judgment and claim of the defendant; and that, in all other respects the said judgment be affirmed, defendant, Levy, to pay the cost of this appeal.

No. 8052.

ADOLPH VERRET VS. ROBERT BONVILLAIN; AND ROBERT BONVILLAIN
VS. ADOLPH VERRET. (CONSOLIDATED.)

A. had been living a number of years in New Orleans, where he owned real estate. He was unmarried, old and infirm. He left there, taking with him his furniture, and went to the Parish of St. Mary, to the house of his nephew, where he died a short time after he arrived. His succession was opened both in New Orleans and in the Parish of St. Mary. The question is: where did he reside when he died? *Held* that the circumstances of the case show his residence was in the Parish of St. Mary where he went with the intention of remaining; and that his Succession was legally opened there.

A PPEAL from the Civil District Court for the parish of Orleans.
Tissot, J.

A. L. Tucker for the Administrator appointed in parish of St. Mary, Appellant:

The law fixes the place of the opening of a succession, "in the parish where the deceased resided, if he had a fixed domicil or residence in the State," at the time of his death. C. C. Art. 935.

"A change of domicil from one parish to another is produced by the act of residing in another parish, combined with the intention of making one's principal establishment there." C. C. 41. In case the declaration provided for in C. C. Art. 42 is not made, "the proof of this intention shall depend upon circumstances." C. C. 43; 8 L. 213; 11 L. 178; 12 L. 190; 30 An. 498.

"If it sufficiently appear that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicil is acquired by a residence even of a few days. In questions on this subject, the chief point to be considered is the *animus manendi*," 8 Cranch, 279; 13 L. 297; Story's Conflict of Laws, §§ 46, 47.

"The actual residence of a person at a particular place, with the intention of remaining there permanently, constitutes the place of his domicil, at least until such intention to remain there has been abandoned. And the declarations of the person, where he has no inducement to falsify the truth or to deceive those to whom the declarations are made, are the best evidence of his intention to make his actual residence his permanent residence also." 8 Page C. R. 519-523-4; 1 Woodbury & Minot's R. 12, and cases there cited; 27 Miss. R. 704.

T. M. Gill for the Administrator appointed in New Orleans, Appellee:

First—Evidence of the loose conversations of a person deceased, is of no weight. 10 L. 355; 2 R. 300; 7 R. 112; 6 An. 114. 763-4; 8 An. 278; 10 An. 279; 14 An. 275; 18 An. 618; 24 An. 604.

Second—He who alleges the change of a fixed domicil, must show affirmatively the change.

Third—The deceased's succession must be opened in the parish where he resided, if he had a fixed domicil or residence in this State; if he had neither domicil nor residence in this State, his succession must be opened in the parish in which he owned immovable property, or in which his principal effects are. C. C. 935 (939); C. P. 929.

Fourth—If opened elsewhere, all proceedings would be absolutely null and void. 3 An. 261; 21 An. 399-401; 26 An. 269-70; 27 An. 351-2.

The opinion of the Court was delivered by

TODD, J. August H. Verret died in the parish of St. Mary, on the 2d of April, 1877. His succession was opened in that parish, and Robert Bonvillain appointed administrator thereof, on the 30th of the same month. On the sixth of July following, Adolph Verret was appointed administrator of the same succession by the Second District Court of New Orleans, on representation made that the deceased was a resident of that city at the time of his death. Bonvillain, as administrator, obtained an order from the parish court of St. Mary to sell the property of the deceased, situated in the city of New Orleans. This sale was enjoined by Verret as administrator, on the ground that all the mortuary proceedings in the parish of St. Mary were null because of the succession being improperly opened in that parish.

Bonvillain then brought an action to revoke the appointment of

Verret, made in the parish of Orleans, alleging its illegality by reason of the residence of the deceased being in St. Mary when he died.

These suits were consolidated and tried together. Subsequent to their institution, Bonvillain died, and Philip Patout, having been appointed to succeed him, by the probate court of St. Mary, became a party to the proceedings. There was judgment in the lower court perpetuating the injunction taken out by Adolph Verret against the sale of the property in New Orleans, and declaring the appointment in St. Mary and the other mortuary proceedings there null, and dismissing the suit instituted by Bonvillain for the revocation of Verret's appointment; and from this judgment Patout, successor of Bonvillain, has appealed.

The sole question for our determination is, whether the residence or domicil of the deceased, A. H. Verret, was in the parish of St. Mary or in the parish of Orleans at the time of his death, since the law declares the proper place of the opening of a succession to be in the parish "where the deceased resided, if he had a fixed domicil or residence in the State." C. C. 935. .

The evidence shows that the deceased left the city of New Orleans on or about the first of March, 1877, and arrived in the parish of St. Mary about the fifth of the same month and died there, as stated, on the second of April following.

The deceased had resided in the city of New Orleans for at least fifteen years previous to his leaving for the parish of St. Mary. He was a man about sixty years of age and unmarried, and had been very infirm for several years. He was accompanied from New Orleans to the parish of St. Mary by his nephew, Robert Bonvillain, who lived in that parish, to whose house he went, and where he died.

Upon leaving, he took with him from New Orleans all his furniture, which consisted of a bedroom set. As stated, he had never been married, and had no family or relations living with him at the time.

If the deceased left New Orleans and went to St. Mary with the intention of making his domicil there, the act of leaving coupled with such intention, followed by the act of residing there, would effect a change of domicil from the one place to the other. As more clearly expressed: "A change of domicil from one parish to another is produced by the act of residing in another parish, combined with the intention of making one's principal establishment there." C. C. 41.

It is often a matter of difficulty to ascertain the intention of a person, consisting of the operation of the will or condition of the mind. Our law provides that, where that intention is not expressly declared before the recorders of the parishes from which and to which it is intended to remove, the proof of the intention shall depend on circumstances. C. C. 42, 43.

"Circumstances," as used in the above article, we construe to mean the acts and words of the party whose intention is sought to be discovered, together with his condition and surroundings when the acts were done and the words spoken.

The acts and conditions of the deceased we have already referred to: that he did leave the one parish and go to the other, taking with him his household effects, which, as far as the evidence shows, constituted his movable property; that he was old and infirm, without family or near relations in the place from which he removed; that he went to the house of a nephew—a man of family—where, it might be reasonably supposed, he would hope to find the care and comfort that his condition required.

If the deceased was honest, sincere and truthful—and we have no reason to think otherwise—his words, if he spoke of his intention in making the removal, would be more complete and satisfactory evidence of that intention than his acts and other circumstances just referred to. In fact his words, if faithfully reported, would solve all doubt on the subject. The deceased did make declarations of his intention, and his words spoken and declarations made on the eve of his removing, during the time of his removing, and after reaching his destination or the place to which he removed, have been testified to by numerous witnesses, whose testimony has not been impeached, and whom we have no more reason to disbelieve than we would have to reject any other human testimony. Those declarations were substantially to the effect, that his intention was to leave New Orleans permanently and make his home or domicile in the parish of St. Mary. We have scanned the record closely, and find no evidence that contradicts or is inconsistent with the testimony of these witnesses. The witnesses relied on, as showing such contradiction, mainly testify to acts and expressions of the deceased anterior to his removal, and when his acknowledged residence was in the parish of Orleans, and, to some extent, show only the opinions of witnesses touching the matter at issue.

Nor does it matter, as urged by counsel, that the deceased was in the parish of St. Mary only a few weeks, or few days, prior to his death. If the intention referred to existed, the change was consummated so soon as the act of residing in that parish commenced. As was said in the case of *Gravillon vs. Richards*, 13 L. 297, "As soon as the will of making a permanent establishment in the country is combined with the fact of residence, the residence, even for a few days, fixes the domicile." And it was held by the Supreme Court of the United States: "That if it sufficiently appear that the intention of removing was to make a permanent settlement or for an indefinite time, the right of domicile is acquired by residence even of a few days. In questions on this subject,

Mechanics' & Traders' Insurance Company vs. Richardson & Cary.

the chief point to be considered is the *animus manendi*." 8 Cranch, 279. See, also, Story, Conflict of Laws, 46, 47; 11 L. 178; 12 L. 190; 30 An. 498.

Our conclusion is, therefore, that, at the time of his death, the deceased resided or had his domicil in the parish of St. Mary, and that his succession was properly opened in that parish; and from this conclusion it follows, that the judgment of the lower court was erroneous.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and that the injunction in case of Adolph Verret vs. Robert Bonvillain be dissolved, and the appointment of Adolph Verret as administrator of the succession of August H. Verret, and all probate proceedings in the Second District Court of New Orleans, relating to said appointment and said succession, be annulled and set aside, the appellee to pay costs of both courts.

Rehearing refused.

No. 7963.

MECHANICS' & TRADERS' INSURANCE COMPANY VS. RICHARDSON & CARY.

A party knowingly taking the note of a firm from one of the partners for his own debt, cannot hold the firm or the other partners liable without proof of the special authority or ratification, and the burden of proof of the special authority or ratification is on such holder.

A PPEAL from the Fifth District Court for the parish of Orleans.
Rogers, J

H. N. Ogden for Plaintiff and Appellee:

There was a commercial partnership in existence between John P. Richardson and George W. Cary, at the respective dates of the notes sued on.

An indorsement in blank is presumed to have been placed upon a note at the date thereof. See New Orleans Canal & Banking Co. vs. Samuel Templeton, 20th An. p. 141; and Crosby vs. Morton et al., 13 La. p. 357. All of the indorsements upon the notes sued on are, therefore, presumed to have been placed there at the dates of the two notes respectively. The indorsement includes delivery, see Smith's Mercantile Law, p. 296, "with regard to the meaning of the term indorsement, it should be remarked that it includes delivery to the endorsee."

A note regular in every respect upon its face, indorsed with the firm name by one of the partners before dissolution and actually put into circulation by delivery to the indorsee, also before the dissolution and after dissolution negotiated by the first to a second indorsee, acting in good faith, and for a valuable consideration, is binding upon all the members of the firm. See Parsons N. & B. vol. 1, p. 146.

The mere possession of a negotiable note imports *prima facie* that the holder acquired it *bona fide* for value, in the usual course of business, without notice of any circumstances impeaching its validity, and that he is the owner thereof, entitled to receive the contents of the same from all prior parties thereto. See Daniel's Negotiable Instruments, § 812; 1st Parsons N. & B. 184; Collins vs. Gilbert, 4th Otto, 754.

The holder of negotiable paper will not lose his right except upon proof that he took the paper with knowledge of the want of right in the transferrer to give him the paper.

Mechanics' & Traders' Insurance Company vs. Richardson & Cary.

"Evidence of notice to or of knowledge on the part of the holder of facts which would defeat his recovery must not be ambiguous." Parsons N. & B. p. 260. It must clearly appear that the indorsee was apprised of such circumstances as would have avoided the note in the hands of the indorser. Per Woodbury, *I. Perkins vs. Challis*, 1 N. H. 254. The English rule now is that nothing short of fraud will be sufficient to defeat his right; and Parsons at p. 258 "inclines to the opinion upon high authority that the rule of the late English cases is better adapted to the free circulation of negotiable paper and the true interests of trade." The negligence, according to this author, "must be such and so accompanied as to afford reasonable and sufficient ground for believing that it was intentional and fraudulent."

The genuineness of the two notes sued on was warranted by their delivery for a valuable consideration.

"An indorsement admits the ability and signature of every antecedent party." Smith's Mercantile Law, pp. 294-95-96.

A transfer by delivery, if for a valuable consideration, seems to imply a warranty that the bill or note is genuine. See note (r) to Smith's Mercantile Law, p. 295.

It appears that Richardson knew that Cary was abusing his authority as a partner. Under the circumstances what was his plain duty. Chitty says, "When a partner has discovered that his co-partner is in the practice of improperly drawing, accepting or indorsing bills or notes in the name of the firm, but to accommodate third persons or for his own separate purposes, he should immediately file a bill in equity and obtain an injunction to prevent a repetition of such fraudulent and hazardous practices." Chitty on Bills, Springfield Ed. of 1849, top paging 48 side, p. 49; Story's Equity Jurisprudence, vol. 1, Sec. 669 and cases cited; Stockdale vs. Allery, 37 Penn. St., 486; Bank of America vs. DeFerriet, 23 An. p. 310.

John A. Campbell and Bayne & Renshaw for Defendant and Appellant:

A partner using the co-partnership name by endorsing it on a note which he had procured a stranger to the firm to make to the firm for his personal accommodation, and who endorses the note himself and offers it for discount to an insurance company, which has no connection with the firm, and of which he is a customer, and receives the accommodation for that company, is guilty of a fraud, and the insurance company must prove the consent of the other partner to the discount, or he is not bound. 1 Bedarride, des Sociétés, No. 159 and following sections; 40 Dalloz, Juris. Gen. Société, No. 927; Pothier on Part., § 101; Kendall vs. Wood, L. R., VI Exch., 243; Leveson vs. Lane, 13 C. B. R., N. S. 278; Rogers vs. Batchelder, 12 Peters, S. C. R. 221; Maulden vs. Br. Bank, 2 Ala. R. 502; Catskill Bank vs. Stall, 18 Wend., 466; Satterfield vs. Compton, 6 Rob., 130; Chitty on Cont., 11 ed., 354-5; Add. on Cont., 76; Call. on Part., § 401, 478.

After the dissolution of a partnership the retiring partner borrows a sum of money from an insurance company upon his own check. He leaves as collateral security a note, on which he has signed the names of the makers, and which is payable to the firm whose name he endorses thereon. The firm had no interest in the note, and the other partner had no interest in the discount or knowledge of the endorsement. This partner is not liable to the insurance company on the endorsement. Leckie vs. Scott, 10 L. 416; Wait vs. Thayer, 118 Mass; Dan. Neg. Notes, 273, 274.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The defendants, a firm once composed of John P. Richardson and George W. Cary, are sought to be held liable, as endorsers, on two notes purporting to have been drawn, the one by W.

A. & C. W. Cary, and the other by J. J. Pierce, and which were duly protested, notice of same having been regularly given.

Richardson denied any liability, specially pleading, that the endorsement was for no consideration enuring to the firm, or to him, as plaintiffs knew, or should have known; that said notes or endorsements were not made or used for said firm, or within the course of its business and by any person authorized thereto; that the notes were received by plaintiffs in a private matter with George W. Cary, totally disconnected with the firm and respondents, as plaintiffs knew or should have known; that the firm was dissolved long prior to the institution of this suit. After trial, the lower court gave judgment for one of the notes, for \$1,219 08, and rejected plaintiffs' demand for the other, for \$1,733 39. From the judgment against him Richardson has appealed.

The evidence shows that the notes were endorsed by G. W. Cary, in the name of Richardson & Cary, and were subsequently endorsed by him, in his individual name, and used for his individual purposes to plaintiffs' knowledge, the consideration of the transaction being given to him in his individual capacity; that the notes never belonged to the firm, which had been dissolved prior to the delivery to the plaintiffs, of the note of W. A. & G. W. Cary, the dissolution being known to the plaintiffs.

We think that, under the circumstances of this case, the endorsement of Richardson & Cary, being in the hand of G. W. Cary, and G. W. Cary subsequently endorsing the notes, to the knowledge of plaintiffs, in his individual name, and using them for his individual purposes, to the knowledge of the plaintiffs, these were under the obligation of proving that the transaction had been authorized by John P. Richardson, or that the consideration had enured to him, or to the firm in some manner, which they have not done.

A mortgage of firm property by a partner, in his own name, conveys no title.

The act of each partner is considered the act of the whole partnership, or of all the partners, only so far as that act was within the scope of the business of the firm. Parsons, Ed. 1873, vol. 1, p. 184; 2 Miss. 163; 15 Geo. 197.

Judge Story says: "Every contract in the name of the firm in order to bind the partnership must not only be within the scope of the business of the partnership, but it must be made with a party who has no knowledge or notice that the partner is acting in violation of his obligations and duties to the firm, or for purposes disapproved of by the firm, or in favor of the firm." Story on Part., Sec. 128; see, also, Chitty on Bills, p. 48.

The American adjudications decidedly assume, says Parsons, p. 121,

that the third party taking this paper with the knowledge that it was given for the private or personal debt of one partner, knows enough to put him on his guard, and that he is now bound to inquire whether the firm authorized the use of their name, and can only hold them on the ground that they did so authorize it in fact, and this he must show as the foundation of his claim. In other words, the American courts hold the doctrine, that a third party taking from a partner the signature of his firm for his own debt, cannot hold that firm without proof of authority, adoption or ratification by the firm. Parsons on Part., vol 1, p. 184; 6 B. Monroe, 60; 4 Wendell, 168; 30 An. 1291. *Multo fortiori* is such the case, where the paper is uttered after the dissolution of the firm, as is clearly proved as to one of the notes. Daniel on Neg. Inst., vol. 1, p. 278; 3 Kent 63; Collyer on Part. 544, 127; 1 Starkie, 275; 30 Vermont, 225; 25 Ala. 475.

"The power of a partner is limited to the business of the firm. He who knows that the partner's act is not within the business, knows that it is not authorized, and, if all he knows is, that the partner is acting for his own immediate, direct and several benefit, he has no right to presume that the firm are benefited and authorized it." Parsons on Part., p. 228.

There are some acts in relation to negotiable paper which carry with them the presumption that the partner doing them was not authorized. One of these is the endorsing paper which does not belong to it. P. 235.

"If the firm resists payment, it will be sufficient to show that a co-partner signed the firm name for a private debt due the plaintiff and its defense is then complete, unless the plaintiff reply by showing the assent of the co-partners." Daniels on Neg. Ins., vol. 1, p. 276; 12 Pet. 299; Collyer on Part., Secs. 490, 491; 23 An. 941; 10 L. 416; 5 L. 49.

Under the circumstances and the law, we cannot hold the defendant, John P. Richardson, liable.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court condemning defendant Richardson to pay \$1219 08 with interest and costs, be reversed, and that judgment be now rendered in favor of said defendant rejecting plaintiffs' demand, and it is further ordered and decreed that said judgment exonerating said defendant from liability for the note of \$1733 39 be affirmed, the plaintiffs to pay costs in both courts.

Rehearing refused.

Mr. Justice FENNER recuses himself, having been of counsel.

No. 7961.

MUTUAL NATIONAL BANK VS. J. P. RICHARDSON ET AL.

The rule established in article 336, C. P., debarring a defendant who has denied his signature, from every other defense, does not apply to a partner denying the firm's signature executed by another partner. Affirming 29 An., 546.

A partner cannot use the name of the firm as security for the debt of a third person or of himself without special authority from all those composing the firm. A party receiving such security under those circumstances, although not chargeable with actual *mala fides*, does so at his risk and peril, and cannot hold the firm and its other members responsible, unless upon proof of knowledge, consent or ratification. Review of English and American authorities.

A PPEAL from the Third District Court for the parish of Orleans.
Monroe, J.

T. H. Kennedy for Plaintiff and Appellee:

An individual loaning money to one member of a mercantile firm and receiving a firm note therefor, has a right to presume that the note is made in the course of the partnership business and binds all the members of the firm. 46 Iowa, 485.

Whenever a member of the firm gives a note in the firm name, the presumption is that it is given for a partnership purpose. 31 Michigan, 373; Story on Part., by Gray, Jr., p. 253, note 1; p. 255, note 1, and end of preceding notes; p. 193, § 107; p. 194, § 108; 9 Pick. 272, 274.

Declaration by partner that he is borrowing for the firm binds the firm, whether true or not. 16 Barbour, p. 608; 50 Maine, 442.

Plaintiff's title impeachable only by the clearest proof of fraud and *mala fides*, or dishonesty. 68 Maine, 326, 327; 20 Howard, 343; 2 Wallace, 110.

Under the circumstances of this case, taking Cary's individual note was without significance. Story on Part. (same edition), page 255, note 1.

Carrying proceeds of the discount into Cary's account, also insignificant. Story on Part. (same edition), pages 237, 238. Page 236, note, citing opinion of Lord Eldon.

The fact that the firm's signature was in Cary's handwriting, also insignificant. 77 Pa. State Rep. 118; 12 Wright (48 Pa.), 514.

In connection with article 326, see Story on Part. (same edition), p. 191, § 104. The theory of the foundation of the power of the members to bind the firm, withdraws this case from the scope of the decision in 29 An. 546.

John A. Campbell and Bayne & Renshaw for Defendant and Appellant:

I.

The plaintiff, a banking corporation of New Orleans, sues the defendant, a merchant of the city, upon two endorsements on notes. The defendant denies his responsibility because he did not sign the partnership name, nor consent thereto, and because they were issued by his partner, Cary, fraudulently, in satisfaction of an individual debt of Cary, with the knowledge of the holder.

The material facts are, that Cary obtained in June, 1879, a discount of his individual note for \$10,000 from the plaintiff—to be repaid at the maturity of the note at sixty days after date.

Cary had made a note of Richardson & Cary, payable to M. V. Cary (Cary's wife), for \$10,537.78, payable in January, 1880. He procured his wife to endorse this note and he endorsed it, and left it as collateral security to the former note and the discount. This last note was without any knowledge of Richardson, in no affair of the firm, and the firm did not owe Madam Cary one dollar of the sum included. This was therefore a gross fraud.

Mutual National Bank vs. Richardson et al.

The sixty days elapsed and the note for \$10,000 was not paid.

Cary carried to the bank about \$4,000 and four other notes with endorsements of Richardson & Cary thereon made by himself. The makers of these notes are brothers of Cary, who signed their names thereto. The others were procured by Cary to be made, so that he might use them fraudulently to pay off the balance on the \$10,000 note.

The notes were not the property of Richardson & Cary, though made payable to them. None of the makers had had dealings with the firm.

They were creatures of Cary. Cary signed some of the notes for the makers and procured the others. The notes were applied to the payment of so much of Cary's debt on the note of \$10,000.

II.

The principles of law we invoke for the defence of the defendant are, 1st, "that to apply the social name to the payment of an individual debt of one of the partners is a revolting abuse of his authority.

That this abuse is shared in by a creditor who consents to profit from it. That, when it appears that the primary obligation is the personal debt of the partner, and that the partnership name and credit is employed to discharge it, or to secure it, the other partner is not bound unless his consent has been obtained. 1 *Bedarride, des Sociétés*, No. 159; 40 *Dalloz, Jurisp. Gen., Société*, No. 927; *Pothier on Part.*, § 101; *Kendall vs. Wood*, L. R., VI Exch., 243; *Leveson vs. Lane*, 13 C. B. R., N. S. 278; *Rogers vs. Batchelder*, 12 Peters, S. C. R. 221; *Maulden vs. Br. Bank*, 2 Ala. R. 502; *Catskill Bank vs. Stall*, 18 Wend., 466; *Satterfield vs. Compton*, 6 Rob., 120; *Chitty on Cont.*, 11 Ed., 354-5; *Add. on Cont.*, 76. *Coll on Cont.*, § 401, 478.

The original debt to the plaintiff originated in a loan of money on an individual note of Cary for the sum of ten thousand dollars for sixty days. Cary negotiated the loan and obtained the money.

He left as security for this personal loan a note of Richardson & Cary to his wife, and procured her endorsement upon it and passed it. The facts leave no doubt that Cary was acting in fraud of his firm and in fraud of the bank in offering as security the social name for his individual use, and the name of his wife, who was incapacitated by the Code from making the engagement. The facts were patent to the bank and the bank acquired no right. Cases cited supra; *Leckie vs. Scott*, 10 La. 416; 1 *Daniel, Negot. Notes*, 273, 274.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The plaintiff seeks to hold J. P. Richardson, as a member of the firm of Richardson & Cary, liable for two notes, endorsed by G. W. Cary, the other member, in the name of the firm. Cary confessed judgment, but Richardson resists, on the ground that the endorsements were made by Cary, for his personal use, fraudulently, to plaintiff's knowledge.

On the trial, the notes sued upon were offered to be introduced in evidence; but the defendant objected, unless the endorsements were first proved to be genuine. The objection was sustained, the proof was administered and the notes with the endorsements were introduced in evidence.

Thereupon the plaintiff's counsel moved the court for judgment against Richardson, in furtherance of the provisions of Art. 326, C. P.; but the court declined so to do, on the ground that the law did not apply to a member of a firm, denying the firm's signature, executed by

another member of the firm. To this ruling the plaintiff excepted, and the trial of the case was proceeded with.

There was judgment for the plaintiff, and Jno. P. Richardson has appealed.

The article invoked reads :

"The defendant, whose signature shall have been proved, after his having denied the same, shall be barred from every other defense, and judgment shall be given against him, without further proceedings." C. P. 326.

In 29 An. 546, construing that article, with the preceding ones, the Court held that it could receive application in those cases, *only*, in which the defendant was sued on his *personal* signature, and, being punitory in its character, it could not be extended, by implication or analogy, to cases not clearly within its terms. The view expressed was declared to be in harmony with Art. 2244 R. C. C., which authorizes heirs or assigns simply to declare that they know not the handwriting or signature of the person they represent, and the ruling in 1 An. 325 is cited in support.

But for those textual provisions of our Codes, and for the judicial exposition made of them, the allegorical saying, that a firm has as many right hands to sign with as it has members who compose it, might receive application ; but, in presence of the law and of the jurisprudence upon it, it remains, in this instance, without bearing. The ruling of the lower court on the motion, being correct, receives our sanction.

The evidence in the record establishes that, on the 11th of June, 1879, the individual note of G. W. Cary, for ten thousand dollars (\$10,000), at sixty days, secured by the pledge of a note of Richardson & Cary, dated May 7th, 1879, to the order of and endorsed by Mrs. M. V. Cary, payable on January 1st, 1880, for \$10,537.78, was discounted by the plaintiff and the proceeds placed by the bank to his credit, in his individual account.

That first note was not paid at maturity, but a few days afterwards a partial payment was made by Cary, in cash. He then offered for discount, to the bank, four notes, which were accepted, and the proceeds realized by the discount, without passing through Cary's hands at all, were applied to the extinguishment of the amount remaining due on the \$10,000 note, which was then, with the collateral, delivered up to him.

Two of the four notes were subsequently paid by Cary, but the two remaining ones, not having been taken up, are now sued upon. That for \$2,871 is drawn by W. A. & C. W. Cary, and that for \$871 is drawn by Leigh Watkins, to the order of and endorsed by Richardson & Cary, through G. W. Cary. Proper evidence of non-payment, protest and notice, is in the record. No resistance is made owing to the want of any formality in those proceedings.

We do not attach any importance to the surrounding circumstances under which the original transaction occurred between Cary and the bank's vice-president, whose respectability, entire good faith and reliability are far above all suspicion. It is sufficient that the fact exists, to plaintiff's knowledge, that the partnership signature and property, apparently belonging to it, were used by Cary for the purpose of redeeming his individual note, and for his individual advantage, to debar recovery against J. P. Richardson, who is not shown to have either known or authorized the unusual and fraudulent course pursued by Cary, to the injury of the plaintiff.

An attempt was made to connect the transaction with a purchase of exchange for \$15,000 for and by Richardson & Cary; but the two operations were essentially distinct and were not equally known to the two partners. That of Cary was not known at all to Richardson, although that by Richardson, who bought the exchange, may have been, and no doubt was, to Cary's knowledge.

Evidence was adduced that the exchange operation was conducted and carried on by the firm in the regular course of its business and for its legitimate purposes. That transaction, from whatever standpoint considered, cannot be viewed as, in any manner, susceptible of relieving the plaintiff from the consequences flowing from a knowledge of the circumstances of the several negotiations with Cary.

The authorities are numerous and indisputable, that a partner cannot use the name of the firm as security for the debts or liabilities of a third person, or of *himself*, without special authority from all those composing the firm. A party receiving the same under those circumstances, although not chargeable with actual *mala fides*, does so at his risk and peril, and cannot hold the firm and its other members responsible, *unless* upon proof of knowledge, consent or ratification.

A partner, it is true, may, as far as the question of *physical power* may go, but not as far as that of *moral right* may exist, take the money of the firm, and by a reprehensible appropriation, apply it to the discharge of his personal obligations; but this is so for the sole reason that, as money has no ear-marks, creditors who are offered to be paid, are not bound to inquire into the title of the debtor proposing payment. In some instances it might be derogatory or insulting, and in other cases it might be imprudent to do so. Pothier on Partnership, § 101; 40 Dalloz, J. G. Société, No. 927; Debarride, Droit Com. des Sociétés, No. 159.

"If a creditor of one of the two partners choose to take from his debtor what he knows to be partnership securities, or partnership funds, without ascertaining whether the debtor has the authority of his partner as to the application of partnership funds, he does so at his own peril, and it is not enough that he has even a reasonable cause to be-

lieve in the existence of the authority." *Kendall vs. Wood*, Law R. VI, Ex. 243; *Leveson vs. Lane*, 13 C. B. R. N. S. 278; *Parsons*. Also, *Maulden vs. Branch Bank*, 2 Ala. 502, 512, 513; 18 Wend. 466; 1 Ala. 565; 6 R. 120.

In *ex parte* *Golding* (*Collyer on Partnership*, 283), Lord Lyndhurst said: "No principle can be more clear than that, where a partner and a creditor enter into a contract on a separate account, the partner cannot pledge the partnership funds, or give the partnership acceptances in discharge of the contract, so as to bind the firm." The judgment was put on the ground that, unless the other partner assented to the transaction, he was not bound, and that it was the duty of the creditor to ascertain whether there was such assent or not.

In *Dob vs. Halsey*, 16 Johns. 34, the difference between English and American jurisprudence was said to be merely on the question of *onus*, it being there on the partner sought to be held responsible, while it is here on the creditor seeking payment. It was there said that there exists no substantial difference whether the note of a firm be taken for a private debt of one of the partners by a separate creditor of a partner pledging the security of the firm and taking the property of the firm to pay his private debt. "In both cases the act is equally injurious to the other parties. It is taking their common property to pay a private debt of one of the partners." 7 Wend. 326; 6 Johns. 251.

In *Rogers vs. Batchelder*, 12 Peters, 221, the U. S. Supreme Court, Justice Story being its organ, said: "Whatever acts are done by any partner in regard to partnership property or contracts, beyond the scope of the partnership, must, in general, to bind the partnership, be derived from some further authority, expressed or implied, conferred on such partner, beyond that resulting from his character as a partner. Such is the general principle, and in our judgment it is founded on good sense and reason. One man ought not be permitted to dispose of the property, or bind the rights, of another, unless the latter has authorized the act. In the case of a partner paying his own debt out of the partnership funds, it is manifest that it is a violation of his duty and of the right of his partners, unless they have assented to it. The act is an illegal conversion of funds." 13 East. 175; 2 Starkie, 347.

See, also, *Daniel on Neg. Inst.*, p. 273, and cases cited; 10 L. 416; *Chitty on Cont.*, 11 ed. 354; *Addison on Cont.*, 76; *Collyer on Part.*, 283; *Collyer on Cont.*, § 401, 478; *Story on Part.*, Sec. 128, 140; *Parsons on Part.*, 2d. ed. p. 221.

If it be true that operations of the character of that under consideration, are not of unfrequent occurrence in this commercial community, it is more than time that the law governing in such cases be clearly announced, as well for the security of money lenders, as for that of too

Succession of Ames.

reliant partners, and for the denunciation of ill-designed and ill-doing associates, unworthy of the confidence placed in them by their fellow members and their fellow men.

We have carefully considered the points made and the authorities quoted by plaintiff's learned counsel; but, while we concede the respectability and earnestness of those authorities, we cannot admit that, under the circumstances of this case, they can justify us in fixing upon the defendant, Richardson, the liability for which he is sought to be made responsible. The presumptions claimed as existing in favor of the plaintiff are rebutted by the circumstances surrounding the original, main and subsequent negotiations between the parties.

See further, Parsons, Ed. 1873, vol. 1, pp. 184, 221, 228; 2 Miss. 183; 15 Geo. 197; Chitty on Bills, p. 48; 6 B. Monroe, 60; 4 Wendell, 168; Daniels on Neg. Inst., vol. 1, pp. 276, 278; 3 Kent, 63; Collyer on Part., 544, 127, 490, 491; 1 Starkie, 275; 30 Vt. 225; 25 Ala. 475; 12 Pet. 299; 28 An. 941; 10 L. 416; 5 L. 49.

We are unable to concur with our learned brother of the District Court.

It is, therefore, ordered and decreed that the judgment appealed from by J. P. Richardson be reversed as far as it affects him, and it is now ordered, adjudged and decreed that there be judgment in favor of said J. P. Richardson, rejecting plaintiff's demand, with costs in both courts.

Rehearing refused.

Mr. Justice FENNER recuses himself, having been consulted as counsel.

No. 8022.

SUCCESSION OF JOSEPHINE HALE AMES, WIFE OF HUGH O. AMES. ON
OPPOSITION TO TABLEAU. H. O. AMES, EXECUTOR, APPELLANT.

ON MOTION TO DISMISS.

Differently from an Administrator, a testamentary Executor can appeal officially as Executor, from a judgment rendered against him and in favor of the succession.

ON THE MERITS.

The Opponents, being both forced heirs and assignees of some particular legatees, have the right to contest all the debts and charges on the Tableau, and are not limited to the contestation of such only as affect their *legitime*.

An Executor is not entitled to favor in the assertion of merely technical pleas tending to exclude from judicial determination questions affecting the lawful distribution of the estate administered by him.

The rule of exclusion of the husband's testimony against his wife, C. C. 2281, applies only during the existence of the marriage. This question is settled by previous decisions.

The husband cannot claim from the estate of his deceased wife, payment of a contract formed between her and him during marriage.

Succession of Ames.

Demand of delivery or payment of a special legacy, to entitle the legacy to interest, is expressly dispensed with when the legatee is himself the Executor. C. C. 1622-30.

The husband is not entitled against his deceased wife's estate to remuneration for services rendered to her during marriage.

A disguised donation from the wife to the husband, is not reducible to the disposable portion, but is absolutely null and void.

A PPEAL from the Civil District Court for the parish of Orleans.
Tissot, J.

ON MOTION TO DISMISS.

Hudson & Fearn for the Appellees:

It is only where a judgment is rendered by which a succession can be aggrieved, that a succession representative can, in his official capacity, appeal from the same.

Where the judgment disallows a claim placed on the tableau as due to the executor personally, he should appeal in his personal capacity and, failing to do so, the costs of appeal taken by him in his official capacity should not be paid by the succession.

Creditors, whose claims have been disallowed, cannot make themselves parties to the appeal without taking an appeal in their own names and giving bond.

D. C. & L. L. Labatt for the Appellant:

First—"The right of appeal is constitutional and will not be dismissed unless appellees are clearly entitled to dismissal."

Second—The authorities in relation to the right of appeal by syndics and administrators do not apply to testamentary executors, because the latter represent the will of the testator and are bound faithfully to carry out his desires, while the former are mere stakeholders and have no interest to disturb the order of payment made by the court; parties aggrieved have their right of appeal individually.

Third—The will of a testator is the law to govern a testamentary executor, and the succession is aggrieved by a decision which in effect annuls a provision of the will and diverts a part of the estate to a different party from those named by the testator, and deprives the executor of the power of executing it as therein directed.

Fourth—All parties interested, if not appellants are appellees, when by motion and bond filed the court grants the appeal.

ON THE MERITS.

Hudson & Fearn for Opponents and Appellees:

When parties who are forced heirs, and also the transferees of the residuary legatees, describe themselves individually by name, and as forced heirs, in an opposition to the executor's account, praying for all "general and equitable relief," and evidence is received without objection, to show their character as transferees of the residuary legatees, the law, pleadings and proof justify a judgment in accordance therewith, dismissing an exception to their want of capacity. 14 An. 864.

Such a judgment dismissing the exception is fully sustained, when the evidence received without objection shows that the exceptor had full knowledge, personally and by participation in judicial proceedings of record, of the possession of the two capacities by the opponents, and had dealt with them judicially as such. For the object of pleading is notice, to prevent surprise, and to enable the party to meet the issue tendered. C. M. 650; 4 N. S. 280; 7 N. S. 354; 17 L. 238; 5 An. 531, 673; 23 An. 676.

The executor, when he presents his account and tableau, is simply a plaintiff against all the world having an interest to oppose it. Opponents are defendants, and their oppositions are in the nature of answers, requiring no special allegations to authorize the introduction of evidence tending to disprove the correctness of the account. 28 An. 607; 29 An. 521; 30 An. 270; 10 An. 80.

Forced heirs, as such, have an interest to oppose all debts placed on the tableau, when not due or prescribed; for all such debts tend to diminish their *legitime*, which is measured,

Succession of Ames.

not to the entire estate without reference to its debts, but to a *quantum* fixed after deducting all the debts. 28 An. 607; 32 An. 303, *State ex rel. Ames, Executor, vs. Judge of Second District Court*.

Residuary legatees, or their transferees, have also an interest to oppose debts placed on the tableau, when not due or prescribed; for all such pretended debts directly tend to diminish the *residuum* of the estate coming to them under the will.

When the evidence shows that a claim in favor of the executor, individually, rests exclusively on his testimony to show a contract between his deceased wife, the testatrix, to pay him for services to another, the claim must be rejected, because of the incapacity of husband and wife to make such a contract, and also, because the promise to pay the debt of another must be in writing. C. C. article 2278, No. 3; C. C. 2446; 2 An. 484; 1 R. 219; 6 L. 349; 6 R. 276; 1 An. 303; 4 An. 71.

A wife, having children by a former marriage, who contracts a second marriage, is incapable, in law, of giving by testament to her husband, more, in any case, than the usufruct of one-fifth of her estate. Any disguised donation made to the husband of property in full ownership is absolutely and radically null and void. C. C. articles 1752, 1754; 2 An. 42; 15 An. 287.

Such disguised donations, being fraud on the law and contrary to public order and morals, is so absolutely null, that it will be treated as *non scriptum*; and the nullity of the donation may be invoked both by forced heirs and any other parties in interest, as the residuary legatees or their transferees. C. C. article 1519; 15 An. 600; 16 An. 245.

D. C. & L. L. Labatt for the Executor, Appellant:

First—An opposition by forced heirs is not the proper form of proceeding to assail the administration of their ancestor's succession. It can only be done where injury is alleged and proven, and by petition and citation in a direct action.

Second—Parties appearing as litigants, asserting rights flowing from a capacity disclosed under special allegations, and with a prayer for general relief, cannot be relieved from laches or neglect, in failing to set up other rights not disclosed, so as to evade the consequences of a final homologation of an account never opposed by and binding upon them, as to those rights.

Third—Where the machinery for asserting legal rights are disregarded, and parties mistake the remedies to which they are entitled and are concluded by solemn adjudication of a competent court, they cannot, in another form, require the courts to relieve them from the consequences of their own errors or mistakes.

Fourth—A remunerative donation by one of the spouses in the last will, the payment of which is taken out of the disposable portion, is not within the prohibition against giving or bequeathing more than a usufruct of one-fifth to the surviving spouse. See 2 Rob., p. —.

Forced heirs are nothing more than creditors of their ancestors' succession, and if there is ample to pay them, are without legal interest to maintain a suit to annul, or to oppose an account or final tableau. *Rachel vs. Rachel*, 4th An. 501; 8 An. 21.

The acquisition by forced heirs of the title of residuary legatees to the residuum, after full administration, confers no greater or other rights than those from whom they acquired.

The prayer for general relief, applicable to particular pleadings, as forced heirs, cannot be interpreted to permit the presentation of other rights, derived from other parties, so as to open a final judgment of homologation and evade the consequences of the law as to such transferrors. 4 An. 216.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

BERMUDEZ, C. J. A motion to dismiss the appeal taken by the executor of the deceased, is made by her forced heirs, on the ground:

"that the judgment appealed from is one in favor of the succession, which is benefited and not aggrieved thereby, and that said executor cannot be permitted to use his official capacity for his individual advantage when he only is the one aggrieved by the judgment."

The executor claims that the judgment affects not only himself, but also three other parties, a creditor and two legatees, and insists that he has a right to appeal from the judgment, both as concerns himself and those parties, in his official capacity and for their common good.

The authorities relied upon by the movers, 19 L. 278, 11 An. 177, 12 An. 774, 32 An. 889, can receive no application in the case before us. It is evident from the very terms of the motion to dismiss, that it is based mainly on the case in 32d A. R., in which the language used by the movers was employed by the Court.

The duties and rights of *executors* are in this respect different from those of *administrators* of successions.

The appointment of an executor by a testator is a mandate, anomalous in this, that it *begins* when other mandates, intended to be exercised at a different time, *terminate*; i. e., at the death of the principal. Marcadé, vol. 3, p. 104; Art. C. N. 1025. When it is accepted, it is a contract binding on the conscience of the executor, the effect of which he is not lightly to disregard. Mourlon, vol. 2, p. 444 (5); Art. 1034, C. N; Coin Delisle, p. 487, No. 11. By such an appointment, the testator constitutes the executor a *mediator* between the various parties who may have an interest in his succession, whether under the will, or under the law. Duranton, No. 390. The instructions of the principal to his agent in such a case are peremptory, when their execution infringes no prohibitory law. They generally are: You shall pay my debts, as well those existing *before*, as those arising *after*, my death. You shall next pay or satisfy my special legatees, and, otherwise, carry out my intentions. You shall next and last, deliver the residue of my estate to such person or persons as it accrues to, under my will, or under the law, or both.

The executor who has the seisin, represents the active and passive mass of the succession, all the assets, all the liabilities, the entire residue. Where he happens to be a creditor, a legatee, he represents himself as such, *officially*, as effectually as he is authorized to represent others similarly situated. His trust of executor, of confidential agent and mandatory, charged with the execution of the sacred behests of the departed one, and to be held as *such* as long as they contravene no prohibitory law,—derives from the testator and not from the law, and cannot place him in *duriori casu*. He cannot be required to distinguish himself, as a creditor, as a legatee, from himself, as an executor, 3 An. 174, representing as he does all the creditors, all the legatees, and eventually the heirs, be they legal or testamentary. Coin Delisle D. & T.

Succession of Ames.

p. 486, No. 3; Merlin Rep. Vo. Ex. Test. No. 2; Grenier, No. 327; Toullier, No. 577; Duranton, No. 390, 392; Dalloz, ch. 8, Sec. 1, No. 1; Ricard, part 2, No. 66; Pothier, Disp. Test. Art. 2, ch. 5, p. 360; Furgole, Nos. 20, 21, 23; C. N. 1025; R. C. C. 1658, 1659, 1660, 1661, 1672; C. P. 123; 3 An. 172; 10 R. 194; 1 An. 92; 4 An. 571; 7 L. 389; 26 An. 312; 23 An. 369; 12 An. 611.

It is a *personal* mandate, intransmissible in principle, but which, under special legislation in this State, can be, in certain cases, provisionally delegated. R. S. 2349. The powers which are conferred upon him, even where the heirs have taken away from him the seisin of the estate, by furnishing him funds to pay the debts and legacies, continue and last during all the time which is necessary to wind up the estate and to execute the will of the deceased, which is to him, *the law*. *Dicat testator et erit lex*. C. P. 123; R. C. C. 1658, 1676, 1680, 1673; C. N. 1051; R. S. 1471.

He gives no security, but can be required to do so, not only by the creditors of the deceased, or of his succession, by persons claiming property in kind, found among the assets of the succession, but also by the forced heirs of the deceased, when their legitime may be affected. R. C. C. 1677, 1673; Succession Turnell, and authorities there cited. 32 An. 1218.

The functions of administrators are not at all of the same origin and of the same duration as those of executors. They are conferred by law and are restricted to a liquidation of the estate, and to the application of its funds to the payment of its creditors. That result once accomplished, their duties are at an end; they turn over to the heirs of the deceased what may remain in their hands, after payment of the liabilities. They do not represent the *mass* of the succession; they have no mandate of the deceased to execute. Where they are individually concerned as creditors, and their claims are not admitted, the authorities are that, if they appeal, they must do so in their individual capacity. This case in the 32d An. p. 889, was one of that description. Code Practice 123.

Upon a motion to dismiss, which involves the *right* of an executor to appeal from a judgment which modifies an account of his administration, we cannot be expected, particularly in a case the transcript of which contains no less than 823 pages, to go behind the motion of appeal and inquire into the correctness of the judgment complained of, in order to ascertain the effect of such an appeal. It may, however, happen that, on the trial of the case on its merits, if we find that the executor should not have been permitted to appeal as he has done, we may summarily dispose of the case. As at present advised, and in a succession in which the assets have been appraised at more than \$150,000, we do

Succession of Ames.

not feel authorized to dismiss the appeal. 26 An. 312; 1 An. 414; 2 An. 387; 4 An. 534.

It is, therefore, ordered that the motion to dismiss herein be accordingly overruled.

ON THE MERITS.

The opinion of the Court was delivered by

FENNER, J. The will of Mrs. Josephine Hale Ames contained the following provisions:

"My name is Josephine Hale Ames, widow by first marriage of the late Thomas Hale, and now the wife of Hugh O. Ames.

"I am aged fifty-two years and have four children, issue of my first marriage; the eldest is named Mary Hale Porteous; Anais Amelia Hale; the third is a boy, called Edward John Hale, and the fourth is Patrick Julian Hale.

"There is no children by my marriage with Mr. Ames.

"I own property and effects in no other places than in New Orleans, Louisiana, and at Bay St. Louis, Mississippi.

"I owe to Judge Sones and his wife a note given to them in December, eighteen hundred and seventy-one, for two thousand dollars, reduced to nineteen hundred dollars.

"I owe to my husband, Hugh O. Ames, ten per cent on my share of all the collections which he has made for account of the property and succession of Thomas Hale, from the first day of October, eighteen hundred and sixty-nine, until the date of settlement, or his relinquishment of the collection thereof; and I make him executor of my estate, without security and with seizin, or full charge of the property and effects belonging to my estate, wishing and desiring that he should receive full compensation for his services as such executor.

"I wish to give and bequeath unto my husband the sum of one thousand dollars as a special legacy, outside of, and independent of, his commissions as executor, or of any other indebtedness due to him.

"I wish to give and do bequeath to my brother, Edward Jones, a resident of the city of New York, a legacy of one thousand dollars, to be paid out of the third or disposable quantum of my estate.

"I wish and bequeath to my two sisters, Marie Antoinette Morrow, and Mrs. Anais O'Hara, of Cincinnati, the piece of property and improvements, at the corner of Dauphine and St. Peter streets, acquired by me from my mother's succession.

* * * * *

"I give and bequeath the large silver pitcher which I received from the "orphans' fair," a pair of large solitaire diamond earrings, a solitaire diamond ring, and a cluster diamond brooch to my daughter Anais Amelia.

Succession of Ames.

"The silverware which I had in my charge, of my two sisters, and a pair of diamond earrings, and two brooches (small) also their property, I wish returned to them.

"The donations of one thousand dollars each, to my husband and Mr. Sones, and of the property to my sisters or their heirs, is to be computed as part of the disposable portion of my estate. And all the rest or residue of the disposable portion, or third of my estate I am allowed to dispose of, I give and bequeath in equal portions to my two sisters, Marie Antoinette Morrow, and Anais O'Hara; and if I should outlive either or both of them, then and in that case, I give the share herein donated to each, to the children of the said Mrs. Morrow and O'Hara, so that the children of Mrs. Morrow will have her half or share, and the children of Mrs. O'Hara will have her half or share.

"The other two-thirds of my estate, by the laws of this State, belongs to my four children.

"I revoke all other wills I may heretofore made or codicils of wills."

H. O. Ames qualified as executor, and in that capacity administered the estate.

On the 8th of July, 1879, the executor filed his "third provisional account." This account comprises (1st), a detailed statement of his receipts and expenditures on account of the succession, and (2d), a "list of the debts due by the succession of Mrs. Josephine H. Ames, unpaid." Under this last heading were placed the following items:

"No. 10. D. C. Labatt:

1876. For commission in going security to January 29, stay execution on judgment in favor of Slidell, in suit No. 4335, in S. C. of La. vs. Est. Thomas Hale, in order to appeal to S. C. of U. S.

Amount of \$5000 do. same in suit No. 4336, in S. C. of La..

same parties on similar appeal to S. C. of U. S., amount....\$5,000 00

a 2½ per cent. on \$10,000 with interest at 5 per cent. from February 7, 1877, until paid..... 250 00

"No. 11. B. Sones:

Balance of note, according to provisions of will probated,

with interest after December 12, 1879, at 8 per cent. 1,800 00

"No. 12. H. O. Ames:

Legacy, according to provisions of will probated, with interest

at 5 per cent. from February 7, 1877, until paid..... 1,000 00

"No. 13. Edward Jones:

Legacy, according to provisions of will probated, with interest

at 5 per cent. from February 7, 1877, until paid,

Transferred to Morgan L. Smith..... 1,000 00

Forward..... \$12,329 85

Succession of Ames.

"No. 14. H. O. Ames:

For ten per cent. on her share of the collections from community property in succession. Thomas Hale from October 1, '69, to February 7, according to provisions of will probated—

1st account filed.....	\$27,273 89
2d " "	59,650 82
3d " "	27,779 32
4th " "	33,832 05
5th " "	33,377 54
6th " "	8,896 86
7th " "	9,957 60
	<hr/>
	\$200,768 08

$\frac{1}{2}$ thereof..... \$100,384 04

a 10 per cent..... 10,038 40

"No. 15. H. O. Ames:

For commissions on going security to stay execution on judgment favor Slidell heirs in suit No. 4335 in S. C. of La. vs. Ex. of Thos. Hale, in order to appeal to S. C. of U. S., amount \$27,000. Do. same in No. 4336 in S. C. of La., same parties on similar appeal to S. C. of U. S., amount \$20,000.

2 $\frac{1}{2}$ per cent. on \$47,000, with interest at 5 per cent. from February 7, 1877, until paid..... 1,175 08

The children by first marriage, and forced heirs of Mrs. Ames, filed their oppositions to items Nos. 10, 12, 14 and 15 of the account.

Prior to the filing of the account, these children had acquired, and had become the undisputed transferees of, the entire interests of the residuary legatees under the will; so that, at the time of filing their opposition they combined, in their own persons, the qualities *both* of forced heirs and of residuary legatees. This transfer was fully known to the executor, and, indeed, appeared on the record in prior proceedings had in the succession contradictorily with the executor. Their opposition, however, begins as follows: "The petition of opposition of Mrs. Mary Hale Porteous, of Miss Anais A. Hale, Edward J. Hale and Patrick J. Hale, *all of the city of New Orleans, and forced heirs of their late mother, Josephine H. Ames, respectfully shows,*" etc., proceeding to oppose items Nos. 10, 14 and 15, as "not due in whole or in part," and item No. 12, as far as it allows interest on the legacy.

To this petition the executor filed an exception that it disclosed no cause of action, for the reasons (in substance): 1st, that opponents,

Succession of Ames.

appearing only as forced heirs, are without interest to complain of the proposed payment of debts, legacies and expenses, because, over and above the same, there is ample property in the succession to satisfy their *légitime*; 2d, that forced heirs can only complain of donations or legacies, or expenses and costs of administration, when the same exceed the disposable portion, and then only on proof of such excess, and by direct action.

This exception was overruled in the lower court, the oppositions were tried and sustained, and from the judgment the executor has appealed.

On the Exception.

Considering that the terms of their opposition do not expressly confine opponents to their quality as forced heirs exclusively, but that they describe themselves both as individuals "*and forced heirs*;" considering that in their said opposition they assert, not only objections to the account which concerned them as forced heirs, but also some objections which would be appropriate only to their capacity as transferees of the residuary legatees; considering that the executor's full knowledge of their double capacities prevented all danger of surprise to him from any vagueness in the pleadings; considering that the executor, in presenting his tableau and seeking its homologation, stands as plaintiff against all the world having an interest to oppose it, that the burden of proof is upon him to establish its correctness, and that opponents stand as defendants and their oppositions as answers. 28 An. 607; 29 An. 521; 30 An. 270. Considering that, under such answers, they had the right to prove their interest in defending, if denied; considering that, on trial of the exception, it was fully proved that opponents were interested both as forced heirs and as transferees of the residuary legatees, and also that the executor was fully advised thereof before oppositions were filed, we are of opinion that the judge did not err in overruling the exception.

We have less hesitation in announcing this conclusion, in the present case, because the exception was interposed by the executor alone and exclusively in his capacity as such. He is not entitled to favor in the assertion of merely technical pleas tending to exclude from judicial termination questions affecting the lawful distribution of the estate administered by him.

We may add, moreover, that even if we were to hold opponents exclusively to their capacity as forced heirs, no purpose favorable to the desires of appellant would be thereby accomplished. Conceding, *argumenti gratiâ*, that forced heirs, as such, have no interest or consequent right to contest legacies or expenses and costs of administration, when the same do not trench upon their *légitime*, yet it is elementary that

debts due by the deceased at the moment of death are to be deducted from the mass of the succession, and that the proportion due the forced heirs is to be calculated only on the residuum left after such deduction. It follows, therefore, that, in the settlement of successions in which they are concerned, forced heirs have a vital interest in resisting the allowance of debts of the character above stated, unless the same are legally due and owing. Their right to oppose accounts of executors and administrators admitting such debts and seeking judicial sanction thereof, is one commonly exercised and never questioned by any authority brought to our notice.

So far, then, as items 10 and 15 are concerned, they are, if due at all, unquestionably debts due at the death of Mrs. Ames, and, therefore, fully open to opposition by the forced heirs. Nor is the case altered by the proposal of the executor, in a scheme for final distribution presented by him as a witness on the trial of the case, to pay these debts out of the disposable portion. It is the law, and not the mere will or wish of the executor, which fixes the fund out of which debts are to be paid; and the law directs that *such* debts, if allowed, shall be paid out of the mass of the succession.

So with regard to item 14, we consider the issue tendered by the account on its face, is whether it is a *valid debt* due by Mrs. Ames. By reference to the extract from the account presented above, it will be seen (1st.) that "the list of debts" included debts and legacies indiscriminately; and (2d) that while items Nos. 12 and 13, are distinctly placed on the tableau as "*legacies*" under the will, items Nos. 11 and 14, which are equally referred to in the will as *debts*, are not classed on the tableau as *legacies*, but are both set out as sums due, for considerations stated, "according to the provisions of the will probated," those provisions distinctly declaring that the testatrix *owed* the sums set down to the parties mentioned.

The effect of the homologation of the tableau would, therefore, have been the judicial recognition of these claims as debts due by the decedent, and to be paid out of the mass of the succession. The forced heirs, then, even if confined in their opposition to their rights as such, would have had an evident interest to oppose; and, in that case, the only question presented would have been debt *vel non*. If held not to be a *debt*, item 14 must have been stricken from the tableau. This would not have prevented the executor, however, from placing it on a new tableau as a *legacy* or *donation*, if he had so chosen. In that case, however, the residuary legatees (or their transferees) would have had the undoubted right to contest the same. Their failure to oppose the claim when placed on the tableau as a *debt*, and as such payable out of the mass of the estate, could not preclude them from opposing it when

Succession of Ames.

sought to be allowed as a donation payable exclusively out of the *residuum* coming to them.

Hence, we say that, even if the exception had been so far maintained as to confine opponents to their capacity as forced heirs, it would have proved of no ultimate advantage to any party in interest, except possibly in regard to the insignificant item No. 12.

Holding the exception, however, to have been properly overruled *in toto*, and thus admitting opponents' right to urge their opposition in both capacities, we find the issue so enlarged by the pleadings, evidence and argument, as to present all questions involved and argued in the case in proper shape for final determination; and we shall now consider them *seriatim*.

Item No. 10.

We think the judge erred in rejecting this item. It rests upon the testimony of Mr. Ames, the surviving husband; and it is objected that he is an incompetent witness under C. C. 2281, providing that "the husband cannot be a witness for or against his wife, nor the wife for or against her husband." The objection is untenable. We consider it settled, that the rule of exclusion prescribed in this article, applies only during the pendency of the marriage, and ceases, as against the survivor, after the dissolution of the marriage by the death of one of the spouses. Succession of Reilly, 28 An. 669; Lehman vs. Levi, 30 An. 749; State vs. Ryan, *id.* 1176.

Mrs. Hale's agreement to pay, individually, the commission charged is sufficiently proved. Her personal interest in the succession of Thomas Hale, for which the security was given, was a sufficient consideration to support her personal obligation, and the service rendered in becoming security, was one for which compensation might be lawfully stipulated.

Item 15.

The charge, however, by Mr. Ames for his own service in becoming security on appeal bonds for the succession of Thomas Hale, cannot be sustained, for two reasons, viz.: (1st.) The claim, exceeding \$500, is not sufficiently proved by his own uncorroborated testimony under C. C. 2277, and we find no corroborative circumstances whatever; (2d.) the claim can only be supported on the basis of a contract for its payment between him and his wife, and such contract falls within none of the exceptions to the general rule of law rendering husband and wife incapable of contracting with each other.

The judge *a quo*, in his reasons for judgment, distinctly disallowed this item, but, by evident clerical error, his direction to that effect was not carried out in the judgment as written up and signed. Under the prayer for amendment of appellees, we must amend the judgment accordingly.

Item No. 12.

The opposition to this item is confined to the allowance of interest on this particular legacy from the probate of the will. It is unquestionably the general rule that particular legatees are only entitled to interest from the date of demand of delivery of the legacies. C. C. 1626. But the necessity of this demand is expressly dispensed with when the testamentary executor, having seizin, is himself the particular legatee. C. C. 1628-30. Such is the exact case here.

How, and why, should he make demand upon himself?

The cases referred to in the opinion of the judge *a quo* (13 An. 88, 28 An. 603, 24 An. 125) are all cases where the particular legatees were distinct persons from the testamentary executor with seizin. They do not, therefore, apply to the instant case, which falls under the authority of Succession of Boone, 7 An. 127.

Item 14.

This important item is based upon the declaration contained in the will of Mrs. Ames heretofore quoted, viz: "I owe to my husband ten per cent on my share of all the collections which he has made for account of the property and succession of Thomas Hale," etc.

Much reflection has failed to indicate to us any category of valid claims against the succession in which this item could be placed except that of a debt due by the deceased or a donation *mortis causâ*.

The intention of the testatrix appears, conclusively, from the face of the will, to have been the acknowledgment of a debt due by her, to be paid, as a debt, out of the mass of her estate, as shown by the following circumstances:

1st. Such is the plain import of the language used, "I owe," etc.

2d. The same language is used with reference to the note due to Judge Sones and wife, indicating that she regarded the two dispositions as standing on the same basis.

3d. In the succeeding clauses she makes two money bequests, one to her husband and the other to her brother, using therein the usual dispositive terms "give and bequeath," showing the distinction to be present in her mind between *debts* and *donations*.

4th. She directs the "donations of \$1000 each" to her husband and brother, "to be computed as part of the disposable portion" of her estate—suggesting the inevitable inference that she did not intend the *debts* acknowledged in favor of Judge Sones and her husband to be so paid, but expected them to be paid, *as debts*, according to law, out of the mass of her estate.

5th. After directing, as above, the donations mentioned and certain others to be paid out of the disposable portion, she proceeds to "give

and bequeath" "all the rest or residue of the disposable portion or third of the estate I am allowed to dispose of," to her sisters.

In view of these provisions, it is difficult to discover any principle of testamentary interpretation, which would justify the executor or the Court in allowing this charge, under any circumstances, otherwise than as a debt due by the testatrix, and payable out of the mass of her succession.

Thus allowed and thus ordered to be paid, it is manifest that it would trench upon the *légitime* of the forced heirs, which is carved, in proportions fixed by law, not out of the entire mass of succession property, but out of the *residuum* thereof left after payment of the debts of the deceased. The rights of forced heirs, as such, result from the law, and are independent of the will of the deceased, who was powerless to diminish or affect them by any testamentary disposition whatever. Her acknowledgment of this sum as a debt, and her implied direction that it should be paid as such, not out of her disposable portion, the whole of which she expressly disposes of otherwise, but out of the only other possible source, the mass of estate, are in no manner conclusive upon the forced heirs, who have the absolute right to test the genuineness and validity of the debt so acknowledged, before permitting their *légitime* to be diminished by the allowance thereof. It is only actual, legal debts which can be charged upon the mass of the estate to the prejudice of the forced heirs. If a testatrix, besides disposing of the whole disposable portion, could create other recipients of her bounty by simply writing in her will, the words "I owe," instead of "I give," and could thus fasten them as creditors upon the mass, the rights of forced heirs would be deprived of the protection which the law assures them.

The question of debt *vel non*, as to this item, is, therefore, properly raised by the forced heirs, and must be determined independently of the testamentary acknowledgment, which could not make that a debt, which, in law, was not such.

The solution of this question is free from difficulty. It is clear, upon elementary principles, that in the relation of husband and wife subsisting between them, the services of Mr. Ames referred to in the will could not, either by contract or by the operation of law, be the source of any civil obligation on the part of his wife to him. R. C. C. 1760, 1790; 6 La. 349; 1 Rob. 218, 220; 6 Rob. 276; 1 An. 302; 2 An. 483; 4 An. 65.

See, also, *Williams vs. Hardy*, 15 An. 286, where it is held, that after marriage, services, however meritorious, of one spouse to the other, can give no claim against the latter.

Under the construction of the will which we have suggested to be the proper one, we might rest our decision on this point alone.

But, supposing that we erred in this construction and that the provision might be considered in the light of a donation, and, if maintained as such, might be held payable out of the disposable portion, articles 1752 and 1754, Rev. C. C., oppose equally insuperable obstacles to the husband's claim. They provide (article 1752), that "a man or woman, who contracts a subsequent marriage, having children by a former one, can give to his wife, or she to her husband, only the least child's portion, and that only as a usufruct; and, in no case, shall the portion of which the donee is to have the usufruct, exceed the fifth part of the donee's estate;" and (Art. 1754) "husbands and wives cannot give to each other, indirectly, beyond what is permitted by the foregoing articles. All donations disguised, or made to persons interposed, shall be null and void."

These articles, after learned controversy, have been held to apply to testamentary dispositions as well as to donations *inter vivos*. *Depas vs. Riez*, 2 An. 30.

If this claim be not a debt, as we think we have conclusively shown, it can be nothing else than a donation. As such, it falls distinctly within the prohibitions of the articles of the Code which we have quoted. The attempt to class it as a remunerative donation cannot have any effect upon the question. The law makes no distinction between different kinds of donations, but embraces, in its prohibition, all donations alike. Where the services remunerated were of a character which might have been the subject of a lawful contract or of a legal claim founded on a *quantum meruit*, and where the party in whose favor the remuneration is awarded, might lawfully have been made the legatee of the entire disposable portion, such remunerative donations have received the following construction by the courts, viz: If the remuneration did not exceed the value of the services, the donation has been maintained, as a *dation en paiement* of a debt, even though it exceeded the disposable portion; if the remuneration was within the disposable quantum the donation has been maintained, even though it exceeded the value of the services; if it exceeded both the value of the services and the disposable quantum, it would be reduced to the value of the services, if that exceeded the disposable quantum, or to the disposable quantum if that exceeded the value of the services. In more general terms, the doctrine is that, to the extent of the value of the services, the donation is treated as a *dation en paiement* of the debt due for such services; and, as to any excess over the value, it is treated as a donation for which the services are merely regarded as the motive.

Such is the purport of the various cases quoted and relied on by appellant. 2 Rob. 292; 4 Rob. 397; 10 An. 212; 13 An. 87; 8 An. 262; 25 An. 371.

Succession of Ames.

Manifestly, these authorities have no application to a case, like the instant one, where the relation between the parties was such as to render them legally incapable either to contract a debt, or to make the donation to each other. Husbands and wives render to each other, necessarily, many services equally worthy of remuneration with those presented here. If the spouse, having children by a former marriage, might confer bounty upon the second spouse, by simply acknowledging in the will a debt for such services, by simply, as heretofore said, substituting the words, "I owe," for the words, "I give," it is manifest the prohibition contained in Art. 1752, would be completely defeated. For these reasons, we are of opinion that, even if the provision under discussion could be treated as a donation, it could not, as such, be maintained.

It is urged, however, that, as a donation, it would not be null, but only reducible to the usufruct of one-fifth of the estate, which the law permits to be given to the second spouse. Such is not the case. If a donation at all, it is unquestionably a *disguised donation*. It does not, by its terms purport to be a donation, but is disguised in the form of an acknowledged debt. Being a disguised donation, it is not merely reducible, but is struck with absolute nullity by the express terms of Art. 1754, which declares that "all (such) donations disguised, or made to persons interposed, shall be *null and void*."

If this were held to mean that they were reducible merely, the clause would be without any effect. Every donation exceeding the amounts permitted by law is necessarily reducible, and it would be useless separately to predicate that fact of a disguised donation. The law makes a distinction between avowed and disguised donations, and, while the former are reducible merely, it declares that the latter are null and void. The motive of the legislator is apparent—to prevent by such severe penalty all attempts to evade, or perpetrate frauds upon, the law. The point, however, has already been expressly decided by this Court. *Thibodeaux vs. Herpin*, 6 An. 673; *Casanova vs. Acosta*, 1 La. 179. The same doctrine existed in the Roman law and is maintained by the French courts and commentators. See commentaries on this article, of Toullier, Marcadé, Grenier, Troplong, Delvincourt and others.

Difficult questions which might arise as to whether this nullity is available to any but the children of the first marriage, and as to whether, in a case like the one at bar, the nullity would enure to the benefit of those children or of the universal legatees, are shut out in this case by the confusion of the qualities of the children and the legatees in the same persons.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be reversed so far as the same sustains the oppositions

to items Nos. 10 and 12 of the executor's account, and that as to said items the oppositions be rejected and overruled; that it be amended so as to sustain the opposition to item No. 15 of said account; and that, in other respects, it be affirmed; costs in both courts to be paid by the succession.

Rehearing refused.

No. 8289.

THE STATE OF LOUISIANA VS. JOHN McNEIL.

The deposition of a witness taken at the inquest before the Coroner, is admissible in evidence, in behalf of the accused, on the trial of the case, when the witness has died since the inquest.

A PPEAL from the Criminal District Court for the parish of Orleans.
Roman, J.

J. C. Egan, Attorney General, for the State, Appellee :

First—A juror is competent to serve where he has only an impression, and not a fixed and deliberate opinion as to the guilt or innocence of the accused. 33 An. 1101; 14 An. 462; 22 An. 43; 23 An. 142

Second—The testimony of witnesses given before the coroner's jury is inadmissible in evidence on the trial of a case.

Third—The evidence before the coroner's jury is admitted for a restrictive purpose—to prove death, but nothing further. 7 An. 84; 10 An. 456.

Whitaker & Adams for Defendant and Appellant :

Where the juror entertains a preconceived opinion, the only matter at issue in determining the question of competency, is the actual condition of his mind, with respect to the case, at the time that he is tendered to the accused. A juror is disqualified, if his mind be not free from prejudice and bias—if he do not stand indifferent between the State and the accused—or if, because of anything that may operate upon the juror's mind, for the purposes of the trial, the accused be at a disadvantage. Record, pp. 10 and 11; 32 An. 1098; 1 Archb. Pr. and Pl. 550, 626; 2 Smith. (N. Y.) 501; 13 Sm. and M., 189; 11 Leigh, 657; 5 Cal., 347. See Morris's State Cases, 511–513; Ib. 920.

First—The duties of coroners, in England, with respect to the taking and return of depositions upon any inquisition for murder or manslaughter, before 1805 and at that time, were substantially the same as those required of coroners here, in Louisiana. 2 Hawk., c. 46, §§ 13 and 15; 1 and 2 Philip and Mary, c. 13, § 5; R. S., 1870, §§ 651, 661, 662, 664, 665; 7 An. 84.

Second—In this State, the method of trial, rules of evidence, and all other proceedings in the prosecution of crimes, must be according to the common law of England as it existed in 1805, unless otherwise provided. Acts of 1805 and 1855; R. S., § 976; 8 R. 545; 30 An. 847.

Third—Unlike depositions taken before a magistrate, those taken before a coroner do not depend for admissibility upon the right of cross-examination. On the contrary, depositions so taken before the coroner are said to be evidence even though the party accused be not present. And such was the English law in 1805. 1 Bish. on Cr. Proc. §§ 1093, 1094, 1096; Archbold's Pl. and Ev. 13th, Lond. Ed., 213, 214; 2 Hawk. ch. 48, §§ 13 and 15; 2 Hale's P. C., 284; Peake's Ev., 64 and n.; Gilbert on Ev., 138; 8 Cox C. C. 443; 2 Leach C. C. 770; 2

Starkie's R. 208, 211; Bull. N. P. 242; 3 T. R. 707, 713; Harrison's case, 12 St. Tr. 853; Lord Morley's case, Kelynge 55; 2 Jones 53; Salkeld 281; 2 Keble 19; 1 St. Tr. 265. See, also, remarks of Lord Kenyon and Buller, J., in R. v. Eriwell, 3 T. R., 713.

Fourth—The cases of State vs. Parker, 7 An. 84, and State vs. Johnson and Melville, 10 An. 457, are not in point. The question is not whether a person accused of a crime has the right to meet the witnesses face to face, but whether depositions regularly taken before the coroner are admissible in evidence upon proof of the death of the witness.

Fifth—If the accused cannot object to depositions thus taken and returned, by what right can the State, whose officer has summoned the witnesses and returned their testimony, in the manner prescribed by its law, oppose the receiving in evidence of such depositions, upon proof of the death of the informer?

The opinion of the Court was delivered by

TODD, J. The defendant was tried for murder and convicted of manslaughter. From the sentence imposing a fine of fifty dollars, and condemning him to five years imprisonment at hard labor in the penitentiary, he has appealed.

On the trial of the cause, the defendant offered in evidence the deposition of Michael Mallory, taken before the coroner upon an inquisition as to the cause and manner of the death of Augustus Burke, whom the accused was charged to have murdered—Mallory having died after his deposition was taken and before the trial of the accused.

The District Attorney objected to the admissibility of the evidence, upon the following grounds appearing in the bill of exceptions:

"That the proceedings before the coroner's inquest are *ex parte* proceedings, and cannot be raised to the dignity or authority of an examination before a court of justice. The State no more than the defence, the defence no more than the State, is entitled to make use of any such testimony or written deposition before the trial court."

This objection was sustained and the evidence rejected—to which ruling the defendant by his counsel excepted, and retained his bill, making the rejected deposition a part thereof, which comes up with the record.

The question to be determined is, whether this ruling was correct or not.

In this State, the forms of indictment, the method of trial, *rules of evidence*, and all other proceedings in the prosecution of crimes, must be according to the common law of England, as it existed in 1805, unless otherwise provided. Acts of 1805, R. S. 1870, Sec. 976; 8 R. 945; 30 An. 847.

If, under the common law as it existed at that period (1805), the testimony in question was admissible, it must be so still, unless its admissibility is controlled by some constitutional provision or subsequent statutory enactment.

The law in England and this country, relating to depositions taken

before coroners, as to the manner of taking and the effect given them, and the purposes for which they could be used or applied, at and before the time mentioned (1805), is embraced and contained in the Act known as 1 and 2 Phil. & M., c. 13, Sec. 5, A. D. 1854.

This statute remained in full force in England until its provisions were to some extent modified, first by the statute 7 Geo. 4, c. 64, and afterwards by the 11 & 12 Vict., c. 42, passed long subsequent to 1805.

Archbold, commenting on these statutes, says: "Although the former statutes (Phil. & M.) did not contain any express enactment like the above (11 & 12 Vict.), it was yet determined in many cases and recognized as a rule of law, that, in all cases of felony under these statutes, where they were taken in presence of the accused, and he had an opportunity of cross-examining them, the deposition of any such witness might be read in evidence against the accused on trial in case the person who made the deposition were dead." Archbold Pl. & Ev., 13 Lond. Ed., 213, 214.

"Distinction whether taken before justice or coroner. In this respect there is a difference between depositions taken before a magistrate and before a coroner, for the latter are said to be evidence, even though the party accused be not present. The reason given for this exception is, that the coroner is an elective officer appointed on behalf of the public to make inquiry of matters within his jurisdiction, who is therefore presumed to take the depositions fairly and impartially." 1 Bishop Crim. Pro., § 1094; Ball N. S. 242; 2 Phil. Ev. 91.

We read from Bishop on same subject: "How. in United States." "Such being the English law, and the two statutes of Philip & Mary being common law with us, the practitioner, by consulting the statute book of his own State, may readily determine how the matter stands there. The principle on which these depositions are, under statutes like those which prevailed in England down to a recent period, admissible, is, that being regularly taken under provisions of law, the common law accepts them, when it is impossible the personal presence of the witness can be had." 1 Bish. Crim. Pro., 1096; Rex vs. Smith, 2 Sharkle, 208, 211.

The counsel for the State urges in his brief two considerations opposed to the admissibility of this evidence, the last of which particularly is not embodied in the objection made to the admissibility of the evidence on the trial.

The first is, that the powers of coroners, under our State laws, are not as extensive as under the ancient common law of England, and the same effect cannot be given to depositions taken under their authority; and the second is, that the question of their admissibility in trials before

petit juries is controlled by the constitutional provision guaranteeing the right of an accused to be confronted by the witnesses.

In regard to the first suggestion, it is true that coroners, at the present day, do not possess the powers with which those officers were anciently clothed by the common law; and the office of coroner is now of less dignity and importance than formerly under the English system; but, nevertheless, their functions, as bearing on the question at issue, under the laws of England, were very much the same as now exist under our own laws. Thus coroners are declared conservators of the peace. Revised Statutes, 651. They are required to hold inquests over the bodies of those known or suspected of having met violent deaths; to summon juries of inquest and to swear them, "to diligently inquire and true presentment make on the part of the State when and by what means the person came to his death;" to swear witnesses and reduce their depositions to writing; to take recognizance for their appearance at court, to return the inquisition into court, and to arrest the person or persons charged by the inquest with the commission of an offense. Revised Statutes, 655, 657, 660, 661, 664, 665.

These duties, it must be admitted, are very similar to those prescribed by the ancient statutes of England referred to; as will plainly appear from an inspection of them.

In regard to the second—the constitutional objection—urged, it is sufficient to say that, whilst it may operate to the exclusion of such testimony when offered by the State and the objection in question is urged by the accused, it is not applicable when the same testimony is offered by the accused himself. The constitutional provision mentioned was intended and designed to afford a protection to the accused,—to guarantee him against the testimony of witnesses whom he had no opportunity to cross-examine, and whom, perhaps, he had never seen. It is a privilege granted him, but a privilege in his favor which he may waive; and this has been expressly ruled. *State vs. Hornsby*, 8 R. 554; *State vs. Palson*, 29 Iowa, 133.

We know of no statutory provision in this State changing the ancient common law rule with respect to such evidence.

From these considerations, we conclude that the evidence in question was improperly rejected; and in reaching this conclusion, we are governed, to some extent, by the character and wording of the objection made at the time to its admission, which we have reported above. That objection, under our view of the law, was certainly untenable and insufficient to exclude it.

Although we cannot fully judge of the character and probable effect of the excluded testimony, we are satisfied that it was an error com-

 Palmer & Co. vs. Factors' and Traders' Insurance Co.

mitted to the prejudice of the accused, of which he may justly complain, and requires us to remand the case.

From the views expressed it becomes unnecessary to pass on another bill of exceptions in the record, touching the competency of one of the jurors who tried the case.

It is, therefore, ordered, adjudged and decreed that the sentence and verdict appealed from are annulled, avoided and reversed, and the cause remanded to the lower court, to be proceeded with according to law, and the views herein expressed.

 No. 7248.

E. C. PALMER & CO. VS. THE FACTORS' AND TRADERS' INSURANCE COMPANY.

The failure of the insured, to make certain returns of all produce consigned to them and to pay premiums thereon, as stipulated by the underwriter, vitiated and avoided their contract of insurance in the premises.

There was no waiver of the right of forfeiture, on the part of the insurer under the circumstances of the case.

A PPEAL from the Sixth District Court for the parish of Orleans.
Rightor, J

Chas. S. Rice for Plaintiffs and Appellants :

First—The defendant having with full knowledge of alleged breaches of open policy of insurance, received premiums earned thereunder, is estopped from setting up such breaches, to avoid a liability for a loss. Wood on Fire Insurance, pp. 832, 838, 839; 34 Iowa, 69; 26 Iowa, 9; May on Insurance, p. 612; 5 Denio (N. Y.) 154; 3 Hill (N. Y.) 225; 56 Pa. State, 267; 19 Barb. (N. Y.) 441; 48 N. Y. 379; 28 An. 19.

Second—The contract of insurance sued on was voidable, not void, for breach of certain conditions mentioned therein; and voidable only at the election of defendant. The defendant was liable under such policy for losses occurring between the time it was possessed of such knowledge as authorized it to avoid the policy, and the time of its election to avoid the same. Such election affected future shipments only. 27 Ark. 539; Bouvier *verb.* Voidable; 26 Iowa, 9; 55 Mo. 172.

Third—The defendant was liable, at all events, for the loss of the shipment in question, respecting which no default of any sort is alleged, and which occurred before the avoidance of the policy. 28 An. 22.

Gibson, Hall & Montgomery for Defendants and Appellees :

First—The payment of premiums of insurance under an open river policy that has been in force for a long time, accepted by the insurers, does not bind them on a cotton and produce contract attached to the open river policy and issued a year subsequent to its date, where the insured did not sign the cotton and produce contract or comply with any one of its conditions. 6 ed. Parsons on Contracts, vol. 2, pages 367-8; Plahts vs. Ins. Co., 38 Mo. 248; Hartshorn vs. Shoe, 15 Gray, 240; Protection Ins. Co. vs. Wilson, 6 Ohio State, 553; 41 Ill. 295; Phillips on Insurance, vol. 1, 5th ed. page 464, Sec. 866, page 467, Sec. 870, page 419, Sec. 764; 36 Barb. N. Y. 372; 6 Wend. N. Y. 72, 270, 488; 21 Pick. Mass. 162; 12

Iowa, 371; Berwin vs. Ins. Co. No. 5881, N. R. Supreme Court of Louisiana; 28 An. 21, Powell vs. Ins. Co.; 7 An. 244; 23 An. 459; 27 An. 695.

Second—Estoppel can only be enforced in matters of insurance where one of the parties has misled or prejudiced the other and caused him to believe that he had waived his right to plead a certain fact in defense. May on Insurance, 221-631, also, p. 626, Sec. 511; C. C. 2272; 15 An. 569; 23 An. 538.

Third—The furnishing of blanks for monthly returns by an insurance company to its patrons does not imply a delivery to their place of business, and the custom of so delivering them if violated, does not relieve the insured from the express conditions of the contract to make monthly returns and pay premiums.

The opinion of the Court was delivered by

POCHE, J. Plaintiffs have taken this appeal from a judgment of the District Court, rejecting their demand for \$5000, as insurance on a shipment of sugar and molasses, made to them on the 16th of December, 1875, on board of the steamer W. S. Pike, which, together with her cargo, was destroyed by fire at the port of New Orleans, on the night of that day and month; which demand is based on an open river policy taken from the defendant company on the 10th of July, 1874, and on a cotton and produce contract attached thereto on the 6th of May, 1875.

Among other grounds of defence, the insurance company urges that plaintiffs had forfeited their insurance for non-compliance with the conditions of the contract, by refusing or failing to make returns of, and to pay premiums on *all produce* consigned to them, as required by the express terms of said contract of insurance; and we shall rest our decision on that point alone.

The undisputed material facts shown by the record are: that an open river policy was issued to plaintiffs by the defendant on July 10th, 1874, and that on the 6th of May, 1875, a special cotton and produce contract was entered into by the parties and was attached to said policy, under which contract insurance was effected on all produce and merchandise shipped or to be shipped to the assured, for sale or for their own account, by all good steamboats, sail vessels or railroads, and that said contract contained, among other stipulations, the following condition:

"And it is a condition of this insurance that the assured shall make returns of all produce and merchandise by each boat on which the risk may have terminated, and monthly returns of all cotton on which the risks may have terminated, according to the printed form furnished the assured by this company, and the premium that shall have accrued thereon shall be paid in cash at the beginning of every month; and in case the assured shall neglect or refuse to pay the premium in cash that may have accrued, at the beginning of every month, this insurance may be declared void and of no effect by the insurer."

Plaintiffs admit that in the month of November, 1875, they did fail

to make return on certain shipments of produce consigned to them, which, under the contract, should have been returned to the company for entry on the policy, but they urge that they are protected from the consequences of this infringement by the following considerations:

1st. That the company failed to furnish them the printed forms for making such returns, as it was bound to do.

2d. That their omissions to make returns as admitted did not avoid or annul the contract of insurance, but made it only voidable at the option of the insurer.

3d. That the insurer, well knowing of the consignments thus received by plaintiffs and not returned, did not avoid or annul the policy, but on the contrary continued to recognize it in full force, insuring plaintiffs' property thereunder, and receiving premiums on such insurance, long after it had acquired full knowledge of plaintiffs' omissions.

1. As to the alleged failure of the company to furnish the printed blanks for returns, the record shows that such blanks were kept at the company's office for the use of its customers, whenever they desired any. But plaintiffs contend that defendant had established a custom of sending such blanks to the offices of all its customers, monthly or on the arrival of all consignments of produce to any of them, and that such a custom imposed a duty on defendant to deliver such blanks to them at their office, which the company had failed to do in their case.

A vast amount of conflicting testimony is to be found in the record, on the point, as to whether such blanks were delivered at plaintiffs' office in the months of September, October and November, 1875. After carefully reading all that testimony, we think that the weight of the evidence supports defendant's assertions on this point. But be that as it may, we do not agree with plaintiffs in their interpretation of the contract in this particular. The word "furnish" means to "supply" or "provide with," and a party engaging to furnish certain papers to another, could not be held to have bound himself to *carry* and *deliver* such papers to the person's place, residence or business office. In this case, the main obligation in the clause is on the part of the insured, who binds himself to make due returns of all shipments received by him, under a form suggested by the company, which incidentally agrees to furnish him the printed blanks necessary thereto.

It is not pretended that returns of such shipments in writing or in any other form, would not be a sufficient compliance with the obligation to make returns as required by the clause. Hence, it cannot be urged that the company having, for the greater convenience of its customers, with a view to secure regular returns, of a uniform shape, adopted the habit of sending and delivering such blank returns to customers would

be at fault for neglecting, omitting or failing to deliver, or even to furnish printed forms to these plaintiffs or any other customer in any given case.

2. The essential obligation of the insured in all insurance contracts is to pay the stipulated premium. This condition is the *sine qua non* consideration, under which the insurer undertakes the risk covered by his contract.

Now, under the cotton and produce contract which was entered into by the parties in this case, and made part of the open river policy, the contract of insurance was not completed between them before the return of produce to be made by the insured, and we, therefore, hold that the violation of this obligation on the part of the insured vitiated the policy, and avoided the contract. The very import and meaning of the language used, clearly conveys to the mind the conclusion that such was the intention of the parties, and thus must they be considered to have bound themselves. Plaintiffs' counsel in his able brief, contends with great earnestness, that the admitted violations of the contract by his clients, rendered the contract voidable, only, and he relies, in support of his construction, on the last words of the clause which stipulated that for certain reasons, "this insurance may be declared void and of no effect by the insurer," and he argues that the insurer having failed to declare such nullity previous to the loss, but having, on the contrary, continued to deal with plaintiffs under the policy, the company has waived the consequences of the omissions, for which it could have annulled the contract at its option. But a close inspection of the clause will show that the words relied upon have no reference to the omissions to make returns, but to other matters; the full sentence reads: "*and in case the assured shall neglect or refuse to pay the premium in cash that may have accrued, at the beginning of every month, this insurance may be declared void and of no effect by the insurer.*" We construe this language, in connection with the preceding part of the clause, to mean that the insured, who has made due returns of all produce consigned to him, in compliance with his contract, and who may fail or refuse to pay the premium, as stipulated, runs the risk of having his insurance declared void, but the company may, at its option, indulge him for a time, in his neglect to pay such premium, and that such neglect does not absolutely forfeit the insurance. But, as to the obligation to make due returns of consignments on the part of the insured, the language of the contract is different, and the consequences of the omissions must of necessity be different, and thus we see that the obligation to make such returns is made "a condition of this insurance."

After a careful review of all the authorities on this subject, we find that, in all contracts of insurance, the conditions attached to a policy

form part of the contract, and that they must be enforced, whence it follows that the violation of an essential or vital condition of such a contract vitlates the policy, and forfeits all the rights thereunder which the defaulting party could have derived. May on Insurance, 231; Phillips on Insurance, vol. 1, 464-467; Parsons on Contracts, vol. 2, page 367; 7 An. 244, Joseph Rafel vs. Nashville Ins. Company; 12 An. 259, Dowville vs. Sun Mut. Ins. Company; 14 An. 797, Shearer vs. La. Mut. Ins. Company; 27 An. 63, Mayers & Minhill vs. Germania Ins. Company; 29 An. 695, Prudhomme vs. Salamander Ins. Company; 28 An. 938, Epstein vs. Mut. Aid &c. Life Ins. Company.

3. We shall now examine the various acts and dealings of the defendant company under which it is charged that the admitted violation of the contract by plaintiffs had been waived, and the cotton and produce contract thus kept in full force up to the time of the loss sought to be recovered in this suit.

It is charged, and the record shows, that during the months of November and December, after the discovery of the omission to make returns of produce, the defendant had taken risks under the open policy, and received premiums on such insurance from plaintiffs.

Defendant answers to this, that the twenty-nine premiums shown to have been paid by plaintiffs were on their open river policy, and under the stipulations therein contained, and not under the cotton and produce contract under which not a return had been made, and not a single premium paid, from the date of its execution, on May 6th, 1875, to the date of its formal cancellation, on the 22d of December, 1875. The proper solution of this point requires an examination into the differences or modification operated to the open policy by the adoption of the special cotton and produce contract, which was attached thereto by the parties on the 6th of May, 1875; and we see that such examination discloses very serious and material differences between the original policy and the special insurance contract contemplated in the cotton and produce contract.

1st. In the first place, the open policy includes in its scope, insurance on all merchandise or goods of every description, shipped *to or from* the insured, *at and from* and *to* all ports. While, under the cotton and produce contract, the operations are extended to all produce and merchandise shipped *to* and not *from*, the insured, and from all places *to* New Orleans *alone*.

2d. In the open policy, the insurance is the subject of a special and distinct contract for each shipment, to be approved in each case by the company, and to be entered in the book attached to the policy, and each insurance is endorsed on the bill of lading, together with the nature and value of the goods shipped and the rate of insurance.

Murrell vs. Jackson & Manson.

Under the cotton and produce contract, the contract is a general one, and each insurance is operated merely by the return of the shipment *to be received* by the insured, and the value of the produce, such as sugar and molasses is stipulated in the general contract, or to be determined by its market value, and in the case of cotton, the value being fixed by the river committee of the board of underwriters.

After appreciating the striking differences existing between these two contracts, the mind can easily conceive how the defendant could legally continue its insurance operations with plaintiffs under the open river policy without being thereby confounded with its rights and obligations under the cotton and produce contract, which plaintiffs were actively violating to the knowledge of the defendant company, whose knowledge and failure to notify plaintiffs of the existence of their own acts cannot be invoked or construed as a waiver of any of defendant's rights flowing from plaintiffs' serious omissions. This is the consideration which so clearly differentiates this case from that of *Powell vs.* this defendant, reported in 28 An. 19. In that case the defendant contended for a difference to be made between shipments of cotton and shipments of produce, to wit, corn, and the court properly held that the receipt of premiums on consignments of cotton, bound the insurer on consignments of corn, as both were endorsed by, and flowed from, the same contract.

Hence, that decision, so hopefully invoked by plaintiffs, can give them no relief.

Our conclusion is, that by their repeated omissions to make returns of consignments of produce, to which they were bound under the contract, the plaintiffs did vitiate their insurance under the cotton and produce contract, that the evidence fails to show any acts or conduct on the part of the defendant company which could be reasonably or legally construed as a waiver of plaintiffs' violation of the essential condition of the contract of insurance, and that, therefore, the insurance company cannot be held liable for the loss alleged to have been incurred by the plaintiffs by the burning of the steamer *W. S. Pike* and her cargo.

The judgment of the lower court is, therefore, affirmed with costs. Rehearing refused.

No. 7209.

GEO. M. MURRELL VS. JACKSON & MANSON.

The lessee must suffer necessary repairs to be made during the existence of the lease and is not justified in abandoning the premises on that score.

A PPEAL from the Sixth District Court for the parish of Orleans.
Rightor, J.

Murrell vs. Jackson & Manson.

*Singleton & Browne for Plaintiff and Appellee :***First**—The defendants admit the execution of the lease sued on.**Second**—The buildings were old and the work necessary to make them strong, safe and sufficient, for the purposes for which the defendants leased the same, was repairs. *Caffin vs. Redon*, 6 An. 487.**Third**—The plaintiff offered to make the needed repairs, and the defendants were bound under the law to allow the repairs to be made, which could have been done in less than fifteen days, without serious inconvenience to the defendants; and the refusal of the defendants to allow the repairs to be made and the abandonment of their premises, will not relieve them from the payment of the rent. *R. C. C.* 2693, 2694, 2700; *Scudder vs. Paulding*, 4 Rob. 420; *Pesant vs. Heartt*, 22 An. 292; *Diggs vs. Maury*, 26 An. 384; *Wilham vs. Langham*, 28 An. 903.*Lacey & Butler for Defendants and Appellants :***First**—The work required to be done to the leased premises in order to put them in a condition suitable to defendants' business was not in the nature of repairs but of reconstruction.**Second**—The building rented to defendants was not in a condition to be used for the purpose for which it was leased.**Third**—The leased premises were dangerous to life and limb.For these, or any of the above causes, defendants were legally justified in abandoning the property, and dissolving the lease. *C. C.* 2675, 2792, 2699, 2520; 6 An. 488; 14 An. 564; 26 An. 554.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is a suit for rent, claimed under a lease, evidenced in writing.

The defense is that the building was dangerous to life and limb, and not in a condition to be used for the purpose for which it was leased.

The lease is silent as to the destination or object to which the building was to be affected. The inference is that the parties intended that it should be used for one of the purposes to which it had previously been put, or such other as would not impair its character or form, and, in any event, endanger or affect its solidity; the question of destination to be determined according to surrounding circumstances. *Laurent*, vol. 25, No. 257; *Troplong*, Louage, 299, 306, 308, 312, 345; *Delvincourt*, v. 3, p. 192; *Duranton*, v. 17, p. 98; *Duvergier*, Cont. Toul. No. 396; *Domat*, liv. 1, t. 4, Sec. 2, No. 10.It is proved that the building was old, was not constructed for, and had not the appearance of a warehouse; that, although it had been used before to store salt, yet, to the knowledge of both or one of the defendants, that article had not been previously stored in the *third* story—which had scarcely ever been utilized, and that the building was in appearance not fit for such storage there.

The evidence establishes that, by moving up for manipulation, a large quantity of salt in that upper story, the front wall and the third floor threatened to give way. The defendants, apparently alarmed, asked

that the building be made secure, but when the lessor sent mechanics to put things in proper order, they interposed objections and subsequently vacated the premises.

It is unnecessary to determine whether the work necessitated to place the building in a state of security, amounted to repairs or to construction. While the landlord had to maintain the building in tenantable order, R. C. C. 2692, 2695, the tenant was bound to enjoy it, as a good administrator; R. C. C. 2710, but the lessor is relieved from the obligation of keeping the building in good condition, or restoring it to the same, when it is made to require either by the fault of the lessee *volenti non fit injuria*. Laurent, Cours élémentaire, v. 2, p. 483, No. 825; 19 L. 341; 9 R. 205; 9 An. 527; 27 An. 125; R. C. C. 2695, 2711.

As the lessor was ready and willing, at the instance of defendant, to have done what work was necessary to render the building secure, either by repairing or by constructing, the tenants, who were in fault, were bound to submit to a work which they had (even if accidentally) rendered necessary, which they had asked and which, in a short time, with little or no inconvenience to them, would have made the building perfectly secure. 11 L. 194; 6 An. 279, 487, 569; 12 An. 823.

The tenant must use the property so as not to destroy it. It has been accordingly held, in an analagous case, that where the lessee of a magazine for storing grain observes the joists giving way under the pressure of oats, in the second story, *he* should diminish the weight, or support the floor by temporary girders, the furnishing of which is no part of the repairs for which the lessor is liable. The case presents stronger facts than are shown in this instance. Durham vs. Adam, 9 An. 527.

Where the lessee makes another use of the thing than that for which it was intended, and if any loss is thereby sustained by the lessor, the latter may obtain the dissolution of the lease, 7 R. 205, and the lessee is bound to pay the rent until the thing is again leased out, 11 R. 101, 6 An. 74, 1 An. 421, and is liable for all the losses which the owner may have sustained through his misconduct. R. C. C. 2711; 27 An. 124; 28 An. 688.

It is, therefore, ordered and decreed that the judgment appealed from be affirmed with costs.

POCHE, J. I dissent from the opinion of the majority in this case, and reserve the right of giving my reasons in writing at some future time.

Rehearing refused.

No. 8269.

THE STATE OF LOUISIANA VS. THOMAS FISHER.

In a trial for murder, proof of threats made by the deceased against the accused, is not admissible when the threats were not communicated to the latter.

The question of diligence in procuring evidence is essentially of the province of the court below on an application for a new trial, and this Court will not interfere with the discretion of the District Judge in that respect.

A PPEAL from the Seventeenth Judicial District Court, parish of East Baton Rouge. *Sherburne, J.*

J. C. Egan, Attorney General, for the State, Appellee :

First—Threats made by the deceased towards the accused, and not communicated to him before the killing, is incompetent evidence. 21 An. 473; 29 An. 593.

Second—This Court cannot review a judgment refusing a new trial which was asked on the ground of newly discovered evidence. 21 An. 473; 22 An. 468.

Burgess & Burgess and *R. W. Knickerbocker* for Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. The defendant was indicted for the murder of one Harman Matta, under which he was tried, convicted of manslaughter, and sentenced to ten years imprisonment in the penitentiary, and from this sentence has appealed.

There is no assignment of errors filed in this Court, but we find in the record two bills of exception which present the grounds, as we learn from the brief of defendant's counsel, relied on for a reversal of the judgment.

The first bill was taken to the refusal of the judge *a quo* to admit proof of threats made by the deceased against the accused, but which were not communicated to the accused.

Under the authority of all the eminent writers on criminal law and the frequent adjudications of this Court, this evidence was properly excluded. Wharton, Homicide, 215; 21 An. 475; 22 An. 468.

The second bill was taken to the ruling of the judge refusing a new trial. The motion for a new trial was upon the ground of newly discovered testimony—that is, testimony discovered after the trial. It appears from the bill that the ruling of the judge upon this point was based mainly, if not exclusively, on his conclusion that due diligence had not been used to procure the evidence on the trial. This question of evidence was peculiarly within the discretion of the judge of the first instance, and this Court has invariably refused to review such ruling, involving merely the legitimate exercise of this discretion and presenting purely unmixed questions of fact. 11 An. 478; 21 An. 273; 22 An.

468. Besides, as far as we can gather from the bills, the evidence referred to was of the identical character with that which had been offered on the trial and properly refused as shown above.

We have closely scrutinized the entire record and we can find no ground whatever on which the accused can be relieved.

The judgment and sentence appealed from are, therefore, affirmed with costs.

ON REHEARING.

A rehearing was granted in this case upon the application of the defendant suggesting that the record did not show that the indictment was presented in open court, in the presence of the accused, when the verdict was delivered, or that, before passing sentence, the accused was asked whether he had anything to say why the sentence should not be pronounced.

Since the granting of the rehearing the record has been corrected, under a *certiorari* granted by this Court, and the omissions suggested supplied. The record is now complete, showing an exact observance of all the required formalities and proceedings in the lower court in the prosecution of the accused under the indictment.

The case has been reargued in all the issues originally presented, and we have been particularly urged to change our previous ruling on the question of the admissibility of the evidence relating to the alleged threats made by the deceased. We cannot do so. A re-examination of the authorities on the subject, including those to which special reference was made in the last argument, only confirm us in the conclusion that the threats of the deceased, unless shown to be connected with the *res gestæ*, the acts of the parties at the time of, or immediately preceding the homicide, cannot be considered. 33 An. 1087. No such connection appears from the record; and, in the absence of such, it is a matter of no importance to ascertain what might have been the feelings of the deceased towards the accused. It will be remembered that the threats referred to were never communicated to the accused—at least no evidence of that fact is shown in the record.

Our previous decree must, therefore, remain undisturbed.

No. 7848.

T. L. AIREY & CO. VS. THE OKOLONA SAVINGS INSTITUTION.

The evidence does not establish such contract and liability on the part of Defendant as charged by Plaintiffs.

Plaintiffs having by their conduct led Defendant to believe that a certain party was their accredited agent, are estopped from denying the agency.

It is elementary that a demand, not embraced in the pleadings and, therefore, not passed upon by the lower Court, cannot be urged on appeal.

A PPEAL from the Fourth District Court for the parish of Orleans.
Houston, J.

William F. Mellen for Plaintiffs and Appellants.

Thos. J. Semmes and *T. M. Gill* for Defendant and Appellee.

The opinion of the Court was delivered by

POCHE, J. Plaintiffs seek to recover \$2490 63, alleged to be due to them by the defendant, as a balance of a special deposit of \$4990 63 placed to their credit at the defendant bank on November 1, 1878, the latter having accounted for \$2500 of said deposit, but having failed to account for the balance.

After answering by general denial, the defendant admits to have received the deposit as alleged, but avers that it has fully accounted to plaintiffs for the whole of said deposit, as follows: That said sum of money had been entrusted to defendant, for the purpose of being paid out for purchases of cotton, to be made in Okolona, Miss., by plaintiffs' customers or agents, at the demand or order of the latter. That, in obedience to instructions received by defendant from plaintiffs' agent and solicitor, Seymour, with whom arrangements for said deposit had been made, defendant had paid out the whole amount thus deposited, on the orders or checks of R. R. Ward, who had been represented by said Seymour as fully authorized to draw on said fund. That the amount of \$2500, acknowledged as a credit on said sum by plaintiffs, had been paid out by defendant to the order of said Ward, by virtue of, and under the instructions of said Seymour, to the knowledge of the latter, and with the approval of plaintiffs, who are, therefore, bound by the subsequent payments made by the defendant, in the same manner, on the order of said Ward.

The judgment of the District Court rejected plaintiffs' demand and they have appealed. The record shows that, as far back as the 5th of September of that year, the arrangement touching this deposit was made between the cashier of the bank and the duly accredited agent of plaintiffs, Seymour; but that, owing to the interruption of communication between Okolona and New Orleans, on account of the yellow fever quarantine of that year, it was not carried out before the first of No-

vember following. Beginning on that day, the bank commenced to pay and to debit to plaintiffs' funds, the checks of R. R. Ward, who was then purchasing cotton at Okolona for consignment to plaintiffs,—and that by the 11th of that month Ward had drawn, and the bank paid, twenty checks, aggregating \$1500,—to cover which, Ward drew a draft on plaintiffs, to whom it was forwarded to its credit by defendant, and that said draft was duly honored by them; and that between the 11th and the 18th of the same month, Ward drew, and the bank paid, out of the same fund, fourteen checks, amounting together to \$1000, which amount was covered by another draft of Ward on plaintiffs, who received and honored it in due time. The record further shows that between the 18th of November and the 12th of December, the bank debited to that fund some twenty-eight checks of Ward, the last of which being for \$300, and being by \$106 41 in excess of the balance of the fund, was only partially charged to debit of plaintiffs, to wit: for \$193 59. On the 26th of December Ward drew on plaintiffs for \$2490 63, to cover the amount of checks drawn by him between the two dates last mentioned. But, on receipt of this draft, plaintiffs refused to allow credit for it to the defendant, to whom they returned it, and, on the other hand, they drew in favor of their agent, Seymour, on the defendant, for that identical sum, as their balance in the bank, where the draft was duly presented and refused, whereupon it was protested by Seymour.

The whole controversy turns upon the nature of the contract made by plaintiffs, through their agent, Seymour, with the defendant bank, in the beginning of September.

Plaintiffs' theory is that their funds were deposited with the bank, with a view to facilitate purchases of cotton, at Okolona, for consignment to their house, through customers who were to be selected and controlled by the bank, and that the orders of such customers were to be honored by the bank, only upon satisfactory proof that the funds drawn were used only for the purchase of cotton for, and actually consigned to plaintiffs, and that the bank was responsible to them for any amounts paid by it out of that fund, and not properly accounted for, or misapplied by, any purchasing customer. Hence, they contend that Ward, having failed to ship to them any cotton to represent the sum of \$2490 63, remaining to their credit after the draft of November 18th, the bank is responsible to them for that sum, whether it was paid out to him or not, for it was the duty of the defendant, under the contract, to see that the funds drawn by Ward were actually used in the purchase of cotton, to be consigned to them.

This theory is denied by the officers of the bank, who contend that the funds were thus deposited to facilitate the purchase of cotton at Okolona, by plaintiffs' own agents or customers, who were to be selected

by themselves, and after such persons were made known or accredited by plaintiffs to the bank, the latter was to honor the demand for funds emanating from the person or persons thus selected, and to charge the sums thus drawn to the debit of plaintiffs' deposit. Hence, they charge that R. R. Ward having been represented to them by plaintiffs' solicitor, Seymour, as a customer authorized to purchase cotton for them, and to draw on their fund, the bank recognized Ward's orders for funds as binding upon both parties to the contract. The bank officers further charge that on the first of November, Ward, who had an account of his own at the bank, informed their cashier that, from the time he began to check on plaintiffs' deposit in the bank, "all his checks on the defendant were to be paid out of said deposit for investment in cotton to be consigned to plaintiffs;" and that all of said fund was thus drawn by Ward, who was the only person or customer ever referred to them touching said deposit by plaintiffs or by their agent Seymour. The testimony in the record, mostly parol, is unavoidably and painfully conflicting, and the witnesses being entirely unknown to us in reference to their veracity, we have been at great pains, in reading over and over their contradictory statements, to detect the truth, which is usually closely concealed in the rubbish of a discordant record.

Plaintiff's theory is supported by the testimony of their confidential agent, Seymour, and by a letter written by him, from Okolona, to his employers, dated the 5th of September, purporting to recite the contract or arrangement which he had made with Babbitt, the cashier of the bank, and which he claims to have read to Babbitt, who approved the same. Both of his statements are flatly contradicted by the cashier, and by McIntosh, the president of the bank, who testifies that, in subsequent conversations with Seymour and Babbitt, the contract made was referred to and construed, without objection from Seymour, in the manner in which it was all through understood and executed by the defendant. Seymour denies that he ever authorized Ward to draw on plaintiffs' fund, and that he ever represented him to the bank as thus authorized. But, on that most material point, he is flatly contradicted by McIntosh, the President, Babbitt, the cashier, by Ward himself, and by Moore, who was Ward's clerk, who all state that Ward was thus represented and accredited by Seymour to the defendant.

In addition to those contradictions, Seymour's testimony is greatly weakened by self-contradictions and other circumstances, which entitle it to very little weight in our opinion.

For instance, in his examination in chief, he fixes the 17th of December as the date of a very important and material conversation between Babbitt and himself at Okolona, and he subsequently admits that he was not in Okolona on that day at all.

Again, in his testimony on cross-examination, he emphatically denies that, in the early part of September, communication between New Orleans and Okolona had been interrupted by reason of the yellow fever panic, and that there was any yellow fever excitement at Okolona. And in his letter of the 5th of September, which is the real basis and the whole groundwork of plaintiffs' theory, we find the following language: "*As soon as communication is open with New Orleans, the house will send the bank here packages of currency of five thousand dollars each to supply the wants of our customers or any one who may ship us cotton from here.*" * * * "*It is impossible to form any definite idea of what will be the condition of things fifteen days hence growing out of this fever panic, which threatens to stop the wheels entirely.*"

His testimony being so contradictory and unsatisfactory upon matters of so grave a character as the interruption of communication between this metropolis and a section of country in which he was actually traveling, and upon other matters equally calculated to impress themselves upon the minds of men, owing, doubtless, to a defective memory, we feel compelled to give no weight to such testimony unless strongly corroborated. 26 A. 591, Cross v. Parent.

But his theory that a bank receiving a deposit, to be paid out in a short time for the purchase of cotton for its depositor, and receiving no compensation or other advantage, will undertake the responsibility of the disbursement of such fund by selecting customers or purchasing agents, or will undertake to disburse such fund to their depositor's customers, upon proof made for every amount drawn, that a corresponding purchase and consignment of cotton have been made, is not only uncorroborated but it is contradicted by four witnesses, whose testimony is unimpeached, and is at variance with all the circumstances and equities of the case and with the custom of the country, as shown by the record.

It is shown that in all these towns on railroads in Mississippi, the cotton purchased, as it was contemplated in this contract, is brought to town in wagons by the farmers or their tenants or laborers, and bought on the streets by merchants, agents or speculators; that frequently one bale of cotton is the joint and undivided property of two or more laborers or other persons, and that the cotton must be paid for in cash before delivery. Other cottons, which are consigned to merchants or to factors at this or other markets, cannot be purchased at these small towns or shipping points, thus restricting the transactions carried on by the customers or purchasing agents to small lots of unengaged cotton, which is handled as above stated.

Under such a state of things it is impossible for the purchasers to obtain delivery of the cotton without cash on the spot, and hence it

Airey & Co. vs. Okolona Savings Institution.

would be impossible for them to furnish to the bank, as a condition of their drawing money, railroad receipts or bills of lading, nor could a bank be expected to undertake to send to a distant depositor a written voucher, either in the shape of a receipt or sight draft, for every purchase made and for every amount drawn, when frequently the purchases from one individual do not cover more than one bale of cotton. Thus it is seen that the amount of \$1500, covered by Ward's first draft, was made up of twenty checks, the greater number of which were for less than \$100, some being as low as \$7 and \$4.

But Seymour's theory and testimony are not even supported by the very acts of his principals, who honored the drafts of \$1500 and \$1000, drawn by Ward, without requiring any other voucher of the defendant, and without inquiring into the manner of drawing their money by Ward.

The course of plaintiffs in dealing with these two drafts not only contradicts Seymour's version of the contract, but it binds them for all of Ward's subsequent checks on the fund in question.

The \$1500 draft was enclosed in a letter from Babbitt, the cashier, who merely says: "I enclose for credit a S. draft of R. R. Ward, \$1500," without a word of explanation. If Ward had been selected by the bank and not by Seymour, a fact which certainly would have been known to the cashier, if not to the plaintiffs, the former would have explained Ward's connection with the fund, or said some words in support of his right to draw on plaintiffs. But the cashier knew that Ward's connection with the fund had been explained to plaintiffs by their solicitor, Seymour. After expressing an opinion on the limited means of Ward, Babbitt adds: "*The arrangement with him, however, was made by Mr. Seymour.*"

Plaintiffs answer this letter, but they ask no questions about the arrangement, and say nothing, showing even astonishment at the information that Ward had been selected as a customer by Seymour. If the statement had been untrue or incorrect, plaintiffs would at once have protested, but they said nothing, and honored the second draft for \$1000, drawn under exactly the same circumstances.

Their silence concludes them and estops them from subsequently denying the agency of Ward in the premises. Story's Eq. Jurisprudence, § 385; 5 A. 107, Meux vs. Martin.

Plaintiffs contend that the money drawn by Ward after the 18th of November, was against his individual account, and that the bank subsequently altered the entries so as to debit them to their account. But this is not supported by the evidence, nor by the extracts from the books themselves, which are all satisfactorily explained by the cashier. The testimony of the President and of the cashier shows that the over-

State ex rel. Bloss vs. Judges of Court of Appeals.

drafts of Ward on his individual account were subsequently reimbursed by credits, which balanced his account within ten dollars.

While it is plain to us that plaintiffs have met with a serious loss in this venture, and that their confidence has been grossly abused, we fail to see how, under the evidence, this breach of confidence can possibly be brought home to the defendant, who has, as we believe, discharged every obligation imposed upon it by the contract, which was correctly understood by its officers, and cannot, therefore, be held responsible for the shortcomings of Ward, or for the misplaced confidence of plaintiffs either in Ward or in Seymour.

The claim of plaintiffs, urged in their brief for the first time, to a judgment on a sum of \$500, acknowledged by defendant to be held to the credit of plaintiffs, as a part payment made by Ward on the draft of \$2490 63, of the 26th of December, which had been returned to defendant by plaintiffs, and which the bank held for collection, as stated in its answer to plaintiffs' letter, cannot be entertained at this stage of the case.

It is elementary that a demand not embraced in the pleadings, and, therefore, not passed on by the lower court, cannot be urged on appeal. Nothing, therefore, in this opinion can affect their right to recover this amount, which, as we understand from the evidence, will be paid by the bank on their order.

The judgment of the District Court is, therefore, affirmed with costs.

No. 8402.

THE STATE EX REL. B. G. BLOSS VS. THE JUDGES OF THE COURT OF APPEALS
FOR THE PARISH OF ORLEANS.

The Court of Appeals has no jurisdiction in a proceeding of which the object is to have the inscription of a mortgage for more than \$1000 cancelled and erased from the books of the Mortgage Office, on the ground that said mortgage is simulated.

APPPLICATION for a writ of Mandamus.

T. Gilmore & Sons for the Relator:

In a rule to erase mortgages, the amount of plaintiff's claim determines the jurisdiction.

The opinion of the Court was delivered by

POCHE, J. Relator seeks by mandamus to compel the Court of Appeals to entertain jurisdiction of an appeal which he has taken from a judgment of the District Court, discharging a rule which relator had taken against Mrs. Henrietta Davidson, the holder of a mortgage of

\$12,000, on the immovable property of his debtor, the defendant in the suit of Bloss vs. Lindop, the object of the rule being to have said mortgage canceled, on the ground that it was simulated and unreal.

The record shows that relator, having obtained a judgment against the defendant for five hundred dollars, with interests and costs, issued execution on his judgment, under which certain real estate of the defendant was seized. This property being encumbered with the mortgage above recited, relator took a rule for the cancellation of the same on the mortgagee, Mrs. Davidson, who answered by a general denial, and in whose favor judgment was rendered by the District Judge.

On his motion, plaintiff's appeal was made returnable to the court of respondents who, *ex propria motu*, refused to entertain jurisdiction of the same, on the ground that the matter in dispute, under the rule, exceeded one thousand dollars and was beyond their jurisdiction.

Relator contends that the amount of his judgment in execution, and not the amount of the mortgage sought to be canceled, is the test of the jurisdiction of the Appellate Court.

We have carefully examined the numerous authorities which his counsel has quoted in support of this position, but we find that they are not applicable to the only point at issue, and that he is not borne out in his conclusion.

The object of relator in his rule is not to cancel the mortgage in so far as it affects his judgment, or his mortgage rights on Lindop's property, or to obtain a decree removing such mortgage as an obstacle in the way of his execution, but to have the whole mortgage declared a simulation, entirely canceled.

The only issue presented by relator in the rule is confined to himself and to the mortgagee, and embraces exclusively the validity or binding force of a mortgage exceeding one thousand dollars.

Under the issue thus presented, the only judgment which the District Court could render and which the Appellate Court could revise, would have for effect the maintenance and recognition or the cancellation of a mortgage in the sum of twelve thousand dollars.

This is not a contest between plaintiff as a judgment creditor and the holder of a conventional mortgage for priority over the proceeds of the property of the debtor, defendant in execution, which was the issue presented in the case of Picard & Weil vs. S. S. Wade, 30 A. 623, quoted by relator, and in which our immediate predecessors correctly held that the amount of the judgment in execution, and not the value of the property seized and sold, nor the amount of the third opponent's claim, was the true test of the jurisdiction of the appellate tribunal, because the issue was a contest over the proceeds of the debtor's property.

Hartwell vs. Alabama Gold Life Insurance Company.

In the case of Loeb & Bloom vs. Arent et al., 33 A. 1086, in which plaintiffs, in execution of their judgment, sought to have a transfer of their debtor declared a nullity as "*to its effect*" on their claim, and in which the property transferred exceeded in value one thousand dollars, we held that the real matter in dispute was the amount claimed by plaintiffs, because they did not seek to annul or do away *in toto* with the transfer complained of, and because they had restricted their demand to annul the contract only in so far as it affected their claim.

In the case at bar, plaintiff demands the cancellation *in toto* of a mortgage exceeding one thousand dollars, and respondents correctly held that the matter in dispute exceeded the amount or limit of their jurisdiction.

It is, therefore, ordered, adjudged and decreed that the order granting an alternative writ of mandamus in this case be rescinded, and that the writ herein prayed for by relator be refused at his costs.

No. 7250.

WM. HARTWELL, AGENT, ETC., VS. THE ALABAMA GOLD LIFE INSURANCE COMPANY.

A policy of life insurance will be annulled when the insured made misrepresentations to the insurer as to his habits of intemperance, although he may himself, in making the declaration, have been in good faith and not have intended to commit a deception.

A PPEAL from the Fifth District Court for the parish of Orleans.
Rogers, J.

Bayne & Denegre for Plaintiff and Appellee:

The defence is special and the burden of proof is upon the defendant. *Terry vs. Insurance Company*, 1 Dillon Rep., 403; 31 Missouri Rep., 725; *Piedmont Life Insurance Company vs. Ewing*, 2 Otto Rep., 379; *Swick vs. Home Insurance Company*, 2 Dillon Rep., 164.

In order to avoid the policy of insurance, it is necessary for the defendant to prove that the declarations that the applicant was sober and temperate, and that if he should become so far intemperate in the use of opiates or ardent spirits as to seriously impair his health and to shorten the term of his life, were fraudulent and untrue as urged in the answer. *Fitch vs. American Popular Life Ins. Co.*, 59 New York, 570; *New York Life Ins. Co. vs. La Bouteaux*, Central Law Journal, vol. 2, p. 806; *May on Insurance*, p. 323; *Fox vs. Penn. Mutual Life Ins. Co.*, 4 Bigelow Life and Accident Insurance Report, p. 462; 1 Bigelow, 702; 4 Bigelow, 69.

All of the representations and statements made in the application and the doctors' certificate accompanying the application, are to be taken and construed together as the language is ordinarily understood. 2 Dillon, 164; *Worcester's Dictionary*, *verbis* sober—temperate.

Thos. J. Semmes for Defendant and Appellant:

This case involves questions of fact only, and the only point of law to sustain which authority is cited, is that the knowledge of the condition of the insured by the agent of a life insurance company, is immaterial as to the question of warranty or misrepresentation or concealment. *Eagle Ins. Co. vs. Vose*, 6 Cushing, 42.

The opinion of the Court was delivered by

LEVY, J. This appeal is taken from a judgment of the Fifth District Court for the parish of Orleans, based on the verdict of a jury for the sum of five thousand dollars, with legal interest thereon from February 5th, 1877, being the amount of a policy of insurance on the life of Thomas C. Hartwell for said sum of \$5000. The policy is dated on the 30th of March, 1874, in favor of his children, the plaintiffs in this action.

Hartwell, the insured, died on the 7th of November, 1877. Due proof of his death was made and submitted to the company and acknowledged, as to its receipt, on the 11th of December, 1877. Under the terms of the policy, if not forfeited and avoided for the causes therein set forth, it was payable within ninety days after proof of death of the insured.

On demand, within the delay fixed for payment of the amount of the policy, the defendant company refused to pay the same, alleging as reason for such refusal, that the policy had become void, and all the rights of the insured therein and thereunder forfeited, by reason of misrepresentations and false statements made by the deceased in his application for insurance, which application and the statements made therein, were the basis and consideration of the issuance of the policy, and that the deceased had warranted the truth of the statements and declarations therein contained, and their falsity operated the annulment of the contract, as also the forfeiture of all premiums paid by the insured. The misrepresentations and false statements relied upon by defendant, are those made by the deceased in his application, touching the use by him of intoxicating liquors and his habits as to sobriety, anterior to and at the time of making the application, as well as to his subsequent habits of drink.

There is no dispute as to the law governing the case, and it presents a naked question of fact for our review and decision.

Question 7 in the application is as follows: "Are the habits of the party, at the present time and have they always been, sober and temperate?" To which the applicant responded "Yes." In the application there is a further declaration by the applicant, to wit: "If the party proposed to be insured on this application for insurance, shall become so far intemperate in the use of opiates, or ardent spirits or intoxicating beverages as to seriously impair his health and shorten the term of his life, then all monies which shall have been paid on account of such insurance shall be forfeited to the said company, and the policy void." Question 32, propounded this inquiry: "Is the party aware that any untrue or fraudulent answers to the above questions or any suppression of the facts in regard to the party's health will vitiate the policy and forfeit all payments made thereon?" to which we find the response "Yes."

The application also contains the following : "This declaration and the above proposed shall be the basis of the contract between us and the said company."

Here, then, is a plain, clearly expressed contract, entered into with a full and explicit declaration of the intentions of the parties, a clear understanding of the basis of the contract, a distinct acknowledgment of the liabilities incurred on both sides, and an unmistakable announcement of the penalties attaching to the untruthfulness of the statements and declarations on which the contract is based.

For the present case and its decision we deem it necessary only to direct our inquiries to the question : Were the declarations of the insured, as contained in his application, true ?

Numerous witnesses have testified as to the habits of the deceased in the use of intoxicating liquors, prior to and at the time of his effecting the insurance upon his life, and subsequent thereto. Habits of intemperance generally grow upon the victim gradually and to him insensibly, and he is aroused to an appreciation of his true condition, if at all, long after the habit has become fixed and has attracted, if not public attention, at least that of those who are thrown into daily or constant social or business intercourse with him, and with self-sufficiency and egotistical faith in himself, he denies and resents, as inapplicable to him, what is apparent to others. But this denial on his part, or disbelief as to his condition, does not affect its real existence; and while, from misconception of the truth growing out of a perverted or distorted view taken by himself, he may be acquitted of any dishonest attempt at deception or misrepresentation, his solemn declaration, although made without fraudulent or untruthful intent, which induces another to bind himself in a manner which he would not have done, in the absence of such declaration, cannot be invoked to the detriment of that other who binds himself on the faith of its correctness.

We do not deem it necessary to enter into a detail of the testimony found in the record, which on the one hand goes to establish, if not the temperance and sobriety of the deceased, the absence of excessive indulgence in the use of ardent spirits or intoxicating liquors, and, on the other hand, the existence of such excessive use or indulgence. We have read all the evidence carefully, have considered the character and good reputation of all the witnesses, the relations which they bore to the deceased, their business and social intercourse with him, their means of knowledge and of observation, their general and special and intimate acquaintance, and we can arrive at no other conclusion, as the result of a critical examination, in which we have sought to give its due weight to the testimony of all the witnesses, than that the representations made by the deceased, Thomas C. Hartwell, in his application for insurance

State ex rel. Dardenne vs. Cole, Judge.

and which formed the basis and a material consideration for the policy, in so far as they relate to his habits of sobriety and temperance, prior to and at the time of the application, are not in accordance with his real condition, and not in themselves truthful in the sense in which the insurance company accepted and acted upon them.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed; and it is now ordered, adjudged and decreed that there be judgment in favor of the defendant rejecting the demands of plaintiffs at their costs in both courts.

Rehearing refused.

No. 8327.

THE STATE OF LOUISIANA EX REL. J. A. DARDENNE, PRESIDENT POLICE JURY,
ET AL. VS. JAMES L. COLE, JUDGE OF THE TWENTY-THIRD JUDICIAL
DISTRICT COURT.

The District Judge has the power to determine whether witnesses have been heard as *experts* and what compensation they should receive as such. C. P. 462.

Having so determined, he has power by Mandamus to order payment of such compensation by the Parish treasurer. C. P. 130.

Such compensation may be fixed by the Judge *ex parte*.

The petition for a Mandamus needs not be in the name of the State. It is only the Writ that must be issued in the name of the State. And the prayer of such Petition being for an *Order commanding*, etc., is equivalent to a prayer for a *Mandamus*. The word is not sacramental.

This Court will not issue the writs of Prohibition and Certiorari to inferior judges in cases in which they have exercised their legal authority and discretion. Previous Decisions affirmed.

APPPLICATION for Writs of Prohibition and Certiorari.

E. B. Talbot, District Attorney, for the Relators.

Chas. O. Lauve for the Respondent.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The object of this proceeding, which is for a *certiorari* and prohibition, is to have it judicially declared, that a District Judge has no power, in a criminal proceeding before him, to determine: that certain witnesses, who testified in the case, did so as *experts*; that they are entitled to compensation as such; that such compensation is chargeable *ex parte* among the costs; that the parish in which the case was prosecuted is bound for such costs, and that payment of the allowance can be enforced by *mandamus* in his court.

The District Judge has made an elaborate, learned and scientific return to justify his conduct.

In the case of the State vs. Baker, indicted for an attempt to com-

State ex rel. Dardenne vs. Cole, Judge.

mit murder, by attempting to administer broken glass in small quantities to one Shiff, it is stated that all the witnesses, who knew of the facts of the case were summoned by both parties, and that on the day of trial, Drs. Postell, Hiriart and Schwing, who had been subpoenaed, were sworn and testified. It is claimed that they knew nothing of the facts, and were heard as witnesses to express an opinion on a scientific question, which was, whether broken glass, administered to a person in his food, was poisonous or not.

The court considered them as *experts* and, for their services as such, allowed each of them ten dollars as compensation, to be included among the taxed costs in the case.

On refusal of the parish treasurer to pay these items, a *mandamus* was asked to coerce payment, but the question presented was not decided.

The present proceedings propose to prevent such payment and to have the preceding orders of the District Judge avoided and set aside.

The District Court for the Twenty-third Judicial District had jurisdiction over the criminal case and, necessarily, of all matters incidental to or growing out of it, particularly of the question of costs, which no other court could assume to determine for it. The accessory always follows the principal.

Under the provisions of article C. P. 462, the court was specially empowered to determine in a civil matter growing out of the criminal proceeding, whether the witnesses had been heard as *experts* and what compensation they were entitled to receive.

The complaint that the compensation was fixed and allowed in an *ex parte* proceeding, is not well founded. Had an account of the same been made and certified by the clerk and by the judge (which could have been, and is usually, done *ex parte*), it would have been the duty of the parish treasurer, under the terms of Sec. 2776 of the R. S., to have paid the same had he been in a condition financially to do so. Because the claim is not presented in that, but is established in a different and better form, a *decree of court*, it does seem that there should be no cause of complaint. On failure by the parish treasurer to pay, without sufficient cause shown, the proper remedy to enforce payment would be by *mandamus*. C. P. 834; 6 An. 68; 14 An. 225, 249, 289; 18 An. 196; 21 An. 352; 27 An. 168; 30 An. 517.

If the District Judge had a right, which we recognize, of deciding the question of remuneration, and, in his discretion, has allowed the compensation, he certainly had authority to entertain the *mandamus* proceeding, as judges possess the powers necessary for the exercise of their respective jurisdictions, even though the same be not expressly given by law. C. P. 130.

In the case of State ex rel. Houston vs. New Orleans, 30 An. 82

State ex rel. Dardenne vs. Cole, Judge.

in which the judge of the Criminal Court had issued a mandamus on the city to pay sheriff's fees, the question of jurisdiction raised by the corporation was not even noticed by the Court. The Court reversed the judgment of the District Court making the mandamus peremptory, because of the special legislation found in Act No. 5 of 1870, prohibitive of *mandamus* proceedings against the city for the purpose of drawing money from the municipal treasury and, no doubt, also of other special recent legislation (Act 1877, No. 55, p. 86,) making the approval of the bill of costs in such cases only *prima facie* from conclusive, which it previously was. 14 A. R. 249, 225; 27 An. 168.

A right to that process was distinctly recognized also in 30 An. 517, where the District Judge had approved bills for expenses in criminal cases due the sheriff.

We consider that the proceeding before the District Judge is for a *mandamus*, although the petition be not in the name of the State on the relation, etc., and the name of the writ is not mentioned in the prayer, which is simply that an order be made commanding the payment, etc. It was not necessary that the petition be made in the name of the State. It is the writ that issues in the name of the State. The petitioner was not bound in his prayer to ask for a *mandamus*. He prayed for an *order commanding*. Those words cover the word *mandamus*, and determine the character of the action. The District Judge had authority to entertain the application and has jurisdiction over the demand so as to allow or disallow it, a thing which he does not appear to have done. 33 An. 498; C. P. 829, 834.

Whether the District Judge has erred or not, in the exercise of the judicial discretion with which the law has vested him, is a question which in an application for a prohibition and *certiorari* in an unappealable case, we cannot consider. We have nothing to do in such case with the correctness of the rulings of inferior tribunals. Our judgment can be sought and obtained only in cases in which it is distinctly charged that there has been an usurpation of jurisdiction or that the forms of law have been disregarded and its requirements violated. 33 An. 257, and cases there decided.

It may be that the District Judge has grossly erred in finding that the witnesses who were heard, acted as *experts*, not having been previously legally appointed for the purpose of serving as such, and that he was wrong in allowing them a compensation for their services. It is possible, in the abstract, that he intentionally acted in utter disregard of the facts and of the law, but we cannot presume here that he did. If such were the case, he, nevertheless, would have acted within the scope of his judicial authority. He may have abused his discretion; but for such wrongful use he is not now answerable to this Court. He may

State ex rel. Dardenne vs. Cole, Judge.

be amenable for it at the proper time and before the proper authority; but under no circumstance can we review, in this proceeding, the correctness of his findings and rulings.

It may well be, also, on the other hand, when the *mandamus* proceeding shall come up for trial, if the correctness of his previous orders is contested for patent errors, that he will permit the relators to establish their defense, acknowledge a mistake, if any was committed, and refuse the relief asked, but, with what he may do, or will have done, we cannot presently deal. We merely decide, that he has jurisdiction over the proceeding brought to enforce payment of his previous allowance, and that we cannot now pass upon anything but the *extrinsic* correctness of the rulings complained of, and which, we find, were made in the forms pointed out by law.

It is, therefore, ordered that the preliminary orders herein made be revoked, and that the petition for a prohibition and *certiorari* be refused at the cost of relators.

Mr. Justice POCHÉ dissents.

DISSENTING OPINION.

POCHÉ, J. I cannot concur with the opinion of the majority in this case.

The writ of *mandamus* is not a writ of right, and must not issue in doubtful cases.

It cannot issue against political corporations, such as police juries, when the duty required of them implies the exercise of judgment and discretion, hence, it cannot issue to a police jury to compel the payment of a specific sum of money not judicially ascertained, and finally adjudicated upon contradictorily with the corporation. In the case of the *State ex rel. J. D. Houston vs. City of New Orleans*, where relator was asking for a writ of *mandamus* to compel the payment of fees due him in criminal cases, our immediate predecessors held that the approval of such bills by the clerk and the judge of the court was not conclusive of their correctness against the city, and recognized the power of the latter to protect itself against the illegality or error of such approval, and the opinion concluded that, in a case where the relator's claim had not been acknowledged by a final decree of a competent court, it cannot be enforced by *mandamus*.

This rule is so well established that it is not gainsayed by the majority of the Court in this case.

But it is held that under section 2776 of the Revised Statutes, providing for the mode of paying expenses in criminal prosecutions, the claim of Dr. Postell, as expert in the case of the *State vs. Baker et al.*

having been approved and ordered to be paid by the judge, the objection of the parish authorities to pay such claim, under an approval which is conclusive and equivalent to a decree of a competent court, becomes merely a ministerial duty, which can be enforced by mandamus.

It is in this conclusion that I humbly differ with my learned brothers. I hold that such an approval is binding upon the parish in so far only as it does not appear upon its face to be made without authority of law, or in direct violation of law.

In this conclusion I am borne out by numerous decisions of this Court, as well as by reason. If the bill on its face showed that it was to reimburse the accused for the expenses incurred by him in his defence, such as the employment of counsel, or for the bribery of witnesses, no one would claim that such a bill, duly approved by the clerk and by the judge, would be conclusive against or binding upon the parish authorities, and no court of justice would enforce the payment of such a bill of costs by mandamus or otherwise.

As stated by this Court in the case of *Parker vs. Robertson*, 14 An. 246, "As the certificate is the evidence of the exercise of a special and limited jurisdiction, it must show upon its face a case within that jurisdiction.

"If, for example, the certificate of the clerk and judge show upon its 'face that it was for fees in civil suits,' payment might be refused
* * * 'because there is no law empowering the judge and clerk to certify them in order to have them paid by the State.'"

The same doctrine was recognized in the case of *Fitzpatrick vs. City of New Orleans*, 27 An. 457, and in *State ex rel. Barrow vs. Fisher*, 30 An. 517. Now, in the case at bar, the record fails to show that Dr. Postell was summoned or testified as an expert; the only reference to him as an expert, being in the *ex parte* order of the judge, fixing his compensation as such.

But be that as it may, I am aware of no law in this State authorizing the judge of a court to fix the compensation for services rendered by witnesses as experts in criminal prosecutions, and I, therefore, maintain that the act of the judge fixing such compensation, being unauthorized by law, is not binding upon the parish.

The law regulating the payment of expenses incurred in criminal prosecutions is to be found in the Revised Statutes of 1870, sections 1042 and 2776, which are identical, and both provide that such expenses, including specifically the pay of witnesses, shall be paid by the respective parishes in which the offence charged may have been committed, the same to be paid by the parish treasurer after an account thereof shall be duly certified to be correct by the clerk and the presiding judge thereof; and section 3946, which provides that "witnesses in all criminal

State ex rel. Dardenne vs. Cole, Judge.

prosecutions shall be paid *one dollar for each day* they may be detained on the trial of such cause," etc. As the law thus fixes and restricts to one dollar a day the compensation of all witnesses in all criminal prosecutions, the question presented is, therefore, where did the District Judge find any law authorizing him to fix the compensation of the witness, Dr. Postell, at *ten dollars a day*, because he testified as an expert? If, without warrant or authority of law, he can increase the compensation of a witness in a criminal prosecution from one dollar to ten dollars a day, what can prevent him from increasing such compensation to one hundred dollars or more? And yet we are told that his action in such a case is final and conclusive and that the treasurer must be coerced by mandamus to pay such claim, without the right or power to contest the legality of the approval. I have sought in vain for, and I undertake to assert that there is no law in this State which makes a difference for the purpose of compensation, between ordinary witnesses and experts in criminal prosecutions.

Art. 462 of the Code of Practice authorizing the court to fix the compensation of experts, etc., refers manifestly and exclusively to *civil suits*, and not to criminal prosecutions, in which the payment of costs is regulated by other special and distinct provisions of law.

I therefore conclude that the certificate of the judge and clerk, allowing to Dr. Postell, a witness in a criminal prosecution, a compensation of ten dollars a day, is unwarranted by law, is therefore not conclusive on the parish, has not the force of a decree emanating from a competent court, is open to legal resistance on the part of the parish treasurer, and that therefore such a claim cannot be enforced by mandamus. One of the principal objects which prompted the Constitutional Convention to frame Art. 90, under which we have a supervisory control over all inferior courts, was to confer on this tribunal the means of shielding and protecting the people against the very abuses of power illustrated by the conduct of the District Judge in this case, the repetition of which has greatly contributed to entail on the parishes of this State the immense debt which weighs them down, and has created high taxation. A proper case is now presented and we should have applied the remedy.

For these reasons I dissent from the opinion and decree in this case.

No. 8274.

[THE STATE OF LOUISIANA VS. JOE DOZIER ALIAS LOBSTER.

When a venire has been regularly drawn, the failure to summon a juror, resulting from mere mistake or error on the part of the officer, without fraud or collusion, and without material injury to the accused, is no sufficient cause to quash the panel.

A PPEAL from the Twenty-fourth Judicial District Court, parish of Plaquemines. *Livaudais, J.*

J. C. Egan, Attorney General, for the State, Appellee:

First—A challenge to the array comes too late after the first day of the term. Sec. 12, Act No. 94 of 1873, p. 169; 5 An. 342.

Second—Where it does not appear that some great fraud has been practiced, or some great wrong committed in the drawing or summoning of the jury that would work a great and irreparable injury, there is not sufficient cause to challenge the array or set aside the venire. Sec. 9, Act No. 94 of 1873, p. 168; 26 An. 580.

Third—The application for a change of venue on account of prejudice involves a question of fact which is not reviewable by this Court. 30 An. 364.

F. C. Zacharie and *L. O'Donnell* for Defendant and Appellant:

First—It is not necessary that a challenge to the array of a jury should be made on the first day of the term, where the circumstances are such that it is impossible so to do, and such a challenge is in time when made immediately on the facts being developed by a jurymen on his *voir dire*. 19 A. 436; 8 R. 514, 618.

Second—The non-summoning of a jurymen, where only the minimum allowed by law has been drawn, is a good ground for challenge to the array. Proffat on Jury Trials, Secs. 130, 137; 14 Iowa, 221; Hilliard on New Trials, p. 136, Sec. 26, and authorities there cited; 12 M. 683; 2 N. S. 192, 626; 3 N. S. 159.

Third—Where one party has been summoned as a jurymen instead of the right person who was drawn, and the substitute appears and answers, it is a radical and base defect in the material of jury panel, and not such an "irregularity," "defect" or "informality" in construction as to be disregarded under the jury statute. 8 R. 514, 618, Proffat, Secs. 130, 137; Hilliard, p. 136, Sec. 26; Graham on New Trials.

Fourth—The accused is entitled to have his twelve jurors selected from the number required by law, excepting those absent sick, removed from the parish, or excused by the judge. 12 M. 683; 2 N. S. 192, 626; 3 N. S. 159.

The opinion of the Court was delivered by

FENNER, J. This case comes up on a bill of exceptions taken by the defence to the decision of the judge *a quo* overruling a challenge to the array made under the following circumstances:

A venire of fifty jurors had been regularly drawn, in compliance with the statute, which included the name of Maurice Domingue, who appeared, by the return of the sheriff, to have been duly summoned. A person had attended with the jury and had, at all roll calls, answered to the name of Maurice Domingue; but when this person was put on his *voir dire* as a juror in this cause, it transpired from his answers that

his name was Joseph Domingue; that he was the son of Maurice and lived in the same house; that, though his name was Joseph and he always so called himself, he was called Maurice by many persons in the parish; that the sheriff served the summons upon him; and that he had thought it his duty to attend and answer to the name in which he was summoned, although his father, the true Maurice, was present in the parish at the time of the summons.

The defense presented a challenge to the array as well as to the poll. The latter was sustained and the person did not serve as juror in the cause; but the challenge to the array was overruled for the following reasons assigned by the judge, viz:

1st. Because the challenge to the array came too late, after the first day of the term.

2nd. Because the grounds alleged are such as relate to the poll and not to the array.

3rd. Because the irregularities and error complained of do not relate to the manner of drawing of the jury, but are simply confined to the non-summoning or erroneous summoning of one of the jurors; that no fraud was alleged or proved, the statement of Joseph Domingue that he was sometimes called Maurice Domingue rebutting all presumption of fraud, if any such could be otherwise inferred.

It is not necessary to consider the validity of the first of the above grounds, because, conceding that, under the circumstances of this case, the challenge was timely, the remaining grounds sufficiently sustain the action of the judge.

We have attentively considered the various authorities relied on by the learned counsel for accused, and do not find them to support his position, that where a venire has been regularly drawn, the failure to summon a juror, resulting from mere mistake or error on the part of the officer, without fraud and without "great wrong committed," that "would work irreparable injury," is a sufficient ground for quashing the venire.

The cases quoted from 12 O. S. 683; 2 N. S. 626; 3 N. S. 159, and 14 Iowa, 221, all refer to the failure to draw the number of jurors required by law. Their supposed applicability to the question now in hand, results from the careless use by the courts of the word "summoning," as the equivalent of "drawing;" and although we have not had access to Proffat on Jury Trial, we think it probable the quotations from that work are susceptible of the same explanation.

The quotations from Hilliard on New Trials, and 4 Eng. L. and Eq. 246, apply to mistakes in the name or other disqualifications of a member of the jury by whom the cause was actually tried.

The general current of authority and of statutory provisions seems

Rocchi vs. Schwabacher & Hirsch.

to be, that mistakes or errors of officers charged with the summoning of jurors will not affect the panel unless there has been fraud or collusion or material injury to defendant. 3 Whart. Cr. L., § 3378; Graham New Trials, p. 35.

Our statute on the subject is very emphatic, "that it shall not be sufficient cause to challenge the venire * * because some of the jurors are not qualified, or because the list may contain the names of some persons not qualified to act, nor because of *any other defect or irregularity* than in the manner of drawing the juries," etc.

In one of the very cases cited for defendant, it was held, at a time when the statute was much less peremptory, that the failure to summon some of the jurors drawn was not necessarily ground of challenge. Cox vs. Wells, 3 N. S. 158.

Counsel is mistaken in the theory that "the constitution and laws of the State gives to every citizen the right to select a jury to try him from the thirty-four of the fifty drawn, left after taking out the grand jury."

On the contrary, it has been held that the defendant is not even entitled to attachments for absent jurors, when there are enough present to complete the panel. State vs. Ballerie, 11 An. 81.

So that, the non-attendance of some of the jurors, even though summoned and not excused, is not good cause for a refusal to go to trial. State vs. Johnston, 11 An. 422; State vs. Kennedy, 11 An. 479.

The law does not guarantee that the prisoner shall be presented with thirty-four jurors from which to select his jury. It provides for the drawing and summoning of that number exclusive of the grand jury, but it fully recognizes that various causes, such as disqualifications, absence, errors or mistakes of officers charged with executing process and the like, may prevent the actual attendance of all of them, and it provides that, in absence of fraud and wrong, such "defects" shall not invalidate the *venire*. If they had such effect, the administration of justice would be embarrassed if not entirely stopped.

Judgment affirmed.

No. 7136.

JOHN ROCCHI VS. SCHWABACHER & HIRSCH.

The purchasing broker in this case was the agent of Plaintiff and not that of both parties. In the sale of goods by merchants, who were not the manufacturers thereof, where there has been no deceit practiced, and where the means of knowledge were at hand and equally available to both parties, and the subject of purchase was alike open to their inspection, if the purchaser did not avail himself of these means and opportunities, he will not be heard to say, in impeachment of the contract of sale, that he was deceived by the vendor's misrepresentations.

Rocchi vs. Schwabacher & Hirsch.

A PPEAL from the Sixth District Court for the parish of Orleans.
Rightor, J

J. Ad. Rozier for Plaintiff and Appellant :

First—Plaintiff never had any view of the article sold. Defendants knew that the lard was not merchantable.

Second—Article 2501, R. C. C., does not comprise such defects as are concealed by reason of the thing purchased being in a box, barrel or package. 7 An. 243; 5 Rob. 217; 3 An. 445; 10 Rob. 5.

Third—As to provisions, vendor represents them as sound and wholesome. Addison Contracts, vol 2, p. 211, § 616. Warranty of kind and quality, as far as it goes. 6 Taunton, 446; 2 Marsh, 141 S. C.; 9 Metcalf, 83; 2 Pick. 214; 3 Rawle, 23; 2 Kent, 489. In the sale of provisions for domestic use, vendor at his peril bound to know that they are sound. John R. (N. Y.) 11 Pick. 484.

Fourth—The vendor who knows the vice of a thing, bound to declare it. 18 Illinois, 23. Warranty that the article is reasonably fit for the use for which it was purchased by plaintiff. 1 Mark, 504.

Fifth—By Art. 2445, R. C. C., defendants are answerable to the buyer, besides repayment of expenses, also damages. 1 N. S. 312. There was fraud.

W. S. Benedict and *Jos. P. Hornor* for Defendants and Appellees :

A sale without warranty of quality, where no representations were made, no facts concealed, no fraud existed, and the vendor was not a manufacturer, but dealer in the property so purchased, below the market price, estops the purchaser from any action to annul the sale.

The Common Law and the Civil Law authorities on this subject are quoted in detail in the brief.

In the case of *Slaughter's Administrator vs. Gerson*, 13 Wall, 379, the Supreme Court of the United States very concisely states the doctrines to govern this case.

The opinion of the Court was delivered by

POCHE, J. Plaintiff seeks to recover \$10,129 68, as damages alleged to have been occasioned to him by the defendants, in the following transaction :

That in January and February, 1875, plaintiff bought from defendants some 539 tierces of lard, at various prices, which lard he shipped for sale, to the city of Hamburg, in Germany, where 512 tierces of said lard were, on inspection, found of so inferior a quality as to be unmerchantable for cooking purposes, and were sold at public auction for much less than the purchase price thereof, the whole resulting in a loss to him of the amount which he herein claims as damages.

Plaintiff alleges, in substance :

1st. That the lard was offered to him through F. Schexnald, a broker, by the defendants, who represented the lard thus purchased by him at the highest prices asked on the market for refined lard, as sound and of good quality.

2d. That the lard, which had not been examined or inspected by him, proved, on inspection, at Hamburg, to be an almost worthless commodity, mixed with tallow, grease and water.

3d. That the defects of this lard, which were not discoverable without chemical analysis, were well known to the defendants, who fraudulently concealed such defects to plaintiff.

In addition to a general denial, defendants, after admitting to have sold the lard to plaintiff at the prices alleged by him, denied that they had made any representations or assumed any warranty touching the quality of said lard, and that they were aware of the defects alleged to have existed in said lard, which they allege to have sold, not as manufacturers or owners thereof, but as commission merchants for the house of F. Humbert & Co., of Louisville, Kentucky, all of which was well known to plaintiff, who purchased the said lard through the broker, Schexnaider, who was, in said transaction, acting for and representing plaintiff and was not the agent or employee of defendants, and who purchased said goods after a thorough examination and inspection of the same.

Plaintiff has taken this appeal from the judgment of the District Court, rejecting his demand.

As usual, in cases turning mainly on questions of fact, the record in this cause is swollen by an immense amount of testimony, some of which is conflicting, and all of which has been diligently scanned and analyzed, with a view to do justice between the parties.

1st. As the capacity or status of the broker, Schexnaider, is an important factor in the case, and as his testimony has not been taken by either party, we have taken peculiar pains to scrutinize the evidence which bears upon this, which we consider as the pivotal point in the controversy, and the record shows conclusively to our minds that in these purchases he was the duly accredited broker or agent of plaintiff, who is, therefore, bound by the acts of Schexnaider in the premises. Plaintiff, while denying the agency of Schexnaider, both in his pleadings and in his testimony, admits in evidence that the latter's commission was paid by him; and he states that, having received an order for a large quantity of lard for shipment to Europe, at as stipulated and limited price, he negotiated with several brokers in Western produce, whose prices did not suit him, and that Schexnaider's prices being lower than all the others, he concluded to deal with him, and that Schexnaider filled the whole order, shipping by one vessel alone some 1304 tierces; 539 of which were bought from the defendants, and the balance, in sundry lots, from five or six other and different merchants. The evidence further shows that all the bills of such purchases were made by defendants and by the other merchants, in the name of "F. Schexnaider, broker,"

who approved the bills, on whose approval such bills were at once and regularly paid by plaintiff. That, in one case, a dealer who had but a small lot of such lard, was requested by Schexnaider to turn over such lot to defendants, who were instructed by him to include the same in the Rocchi purchase, and to charge the same accordingly. That all the lard purchased from defendants was shipped by Schexnaider, who employed the draymen and other help necessary thereto, whose bills for such services were approved by him, and which bills, when presented, thus approved, were paid by plaintiff.

The uncontradicted testimony of several brokers and other merchants, shows that Schexnaider was at that time, and had been for several years previous, a purchasing broker in Western produce; that he was able and competent to examine, inspect and classify different qualities of such produce, particularly lard, and that he had been employed as such by some of the witnesses themselves and by plaintiff for several years. It also appears that defendants did not offer any lard for sale to plaintiff or his agent, but that the latter called on them, and inquired if they had any lard for sale, and receiving an affirmative answer, he would inspect the goods which were shown him, and purchase the same when the price suited him.

The evidence utterly fails to show that defendants ever made any representations touching the quality of the lard which the agent bought from them, or warranted any lot of such commodity to be of any particular quality or market value.

It appears from the testimony of produce brokers and other experts, that three qualities of lard are generally found and handled on the New Orleans market, the *kettle rendered*, the *steam rendered*, and the *refined*, and that the former is the pure article, and commands the highest prices; that the refined is the next in order, and that the steam rendered is inferior to the two others; and the evidence shows that the lard purchased from defendants in this case was branded "refined lard."

It also appears that refined lard contains, to the knowledge of all dealers, foreign ingredients besides pure lard, principally tallow, and the grade or quality of refined lard depends upon the quantity or proportion of foreign ingredients which it contains. It is also shown that the presence of tallow as an ingredient in lard is detected mainly by the smell; but also by inspection, which is made by means of an instrument known in the trade as a "*lard tryer*," which is introduced in the tierce through the bung-hole, and is long enough to reach across to the other side of the tierce, and to either end, by which means lard is drawn from various parts of the tierce, and is thus subjected to inspection; and that this mode of inspection is the only one practiced in the trade.

2d. In this case, it is shown beyond a doubt that all the lard sold

to plaintiff by defendants was examined by the broker, Schexnaider, in the mode above indicated, some of it at defendants' store, other tierces at their warehouse, others at the railroad depot, or at the steamboat landing, while it was being received by defendants on consignment from F. Humbert & Co., the manufacturers, at Louisville, Ky. That this inspection was sometimes made in the presence of one or both of the defendants, or of their clerks or employees, but oftener out of the presence and without the knowledge of either defendants or of any of their clerks. In the latter case, Schexnaider, after examining, at the steamboat landing or elsewhere, any lot of lard which he concluded to purchase, would notify the defendants of the same, on that day or the next.

A careful analysis of the testimony abundantly proves that defendants, who were not the manufacturers of the goods thus sold by them, were perfectly and honestly ignorant of the defects of such goods, of which they had no more occasion, or better means of judging than plaintiff or his broker had; that the quality of the lard was as well known to the vendee's agent as to the vendors, that the latter made no misrepresentations, and practiced no concealments, fraudulent or otherwise, touching the commodity which they were thus selling. And hence, we conclude that they are not responsible in law for the damages which plaintiff has suffered in this unfortunate speculation, brought about by the error of his own agent, who was not deceived by defendants, but was led astray by his own judgment. The rule which governs such a case is laid down in clear language by the Supreme Court of the United States, in 13 Wallace, 379, as follows:

"The misrepresentations which will vitiate the contract of sale, and prevent a court of equity from aiding its enforcement, must relate to a material matter, constituting an inducement to the contract, and respecting which the complaining party did not possess at hand the means of knowledge; and it must be a misrepresentation, upon which he relied, and by which he was actually misled to his injury.

"Where the means of knowledge are at hand, and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say, in impeachment of the contract of sale, that he was deceived by the vendor's misrepresentations."

These considerations have also shaped our own jurisprudence on this subject, and have guided our Supreme Court in the conclusions reached in many cases involving similar issues, which cases we have carefully examined, and by which we have been led to the disposition which we make of this controversy. *Decuir vs. Packwood*, 5 Martin, 306; *Clark vs. Lockhart*, 10 R. 5; *Huntington vs. Lowe*, 3 An. 379; *Shy-*

Bourg vs. Gerding et al.

manski vs. Urquhart, 5 An. 491 ; Holland vs. Toole, 6 An. 426 ; Mure vs. Donnell, 12 An. 369.

The judgment of the lower court is correct, [and is, therefore, affirmed with costs.

Rehearing refused.

No. 8071.

CHARLES T. BOURG VS. CHARLES H. GERDING ET AL.

A judgment simply dismissing the demand of an intervenor, on the ground that he was not present or represented at the trial of the cause, cannot support the plea of *res judicata*. The terms of the judgment itself should govern, and not the statement of the judge made in relation to it in some other proceeding, that there was a clerical error in said terms.

A PPEAL from the Fourth District Court for the parish of Orleans.
Houston, J.

Joseph P. Hornor and Francis W. Baker for Plaintiff and Appellant :

First—An intervention not at issue cannot be tried.

Second—The dismissal of an intervention in the absence of the intervenor and his counsel, has only the effect of a judgment of nonsuit.

Third—The decree of the court can alone be looked to to determine the plea of *res judicata*.

Fourth—Where the decree of the court dismisses an intervention without passing upon the issues raised in it, and which were not at issue, it cannot support the plea of *res judicata* as against those issues.

Merrick, Race & Foster for Defendants and Appellees :

The intervenor must be always ready to plead, or to exhibit his testimony, because he has always his remedy by a separate action to vindicate his rights. C. P. 389.

The intervenor cannot, by absenting himself from court, or by abandoning his cause to its fate, prevent the trial of the case, and action upon his intervention.

A judgment, dismissing an intervention, when all the parties are present or represented therein, is a final judgment, and forms *res judicata*.

The test as to the effect of a decree as *res judicata*, is its finality and conformity to the terms of the Civil Code, 2265; Revised Code 2286. Kellam vs. Rippey, 3 An. 202.

In an application for a writ of injunction, the facts important and vital to the issuance of the writ or not, cannot be ignored, they are essential to the petition, and must be set forth.

The opinion of the Court was delivered by

TODD, J. The plaintiff, claiming to be owner of the property described in his petition, seized and advertised for sale to pay a judgment against one John Dawson, took out an injunction restraining the sale of the property, and asked that it be decreed to belong to him.

He was met in the lower court by the plea of *res judicata*, which was sustained, and his suit dismissed and injunction dissolved with damages, from which judgment he has appealed.

The plea of *res judicata* is based on the following facts : A suit had

Dickson and Husband vs. Dickson et als.

been instituted in the Fourth District Court of the parish of Orleans by Gerding, defendant in the present suit, against one John Dawson, to enforce a privilege or mechanics' lien against the same property now in controversy. In that suit, the plaintiff intervened and set up title to the property. The following judgment was rendered in the case, which we copy :

"This case came on this day for trial, Merrick, Race and Foster, attorneys for plaintiff; C. G. Ogden, for defendant. C. T. Bourg, intervenor, absent and not represented :

"When, after hearing pleading and evidence, and the court considering the law and the evidence to be in favor of plaintiff, Christian H. Gerding, and against defendant, John Dawson, for the sum of one hundred and forty dollars, with interest from judicial demand and all costs, with privilege upon the property sequestered herein. It is further ordered and decreed that the intervention of C. T. Bourg herein, be dismissed with costs."

This judgment is strictly one of nonsuit, rendered in the absence of the intervenor and his counsel, and it is clear that it could not support a plea of *res judicata*. C. P. 535, 536; 3 An. 660; 4 An. 176, 240; 5 An. 166.

It is true that in the written opinion of the judge *a quo* in this case, found in the record, he says that the statement found in the judgment quoted above, touching the absence of the intervenor and his counsel, was a clerical error. This judgment was offered to support the plea of *res judicata*, and we must be governed by the terms of the judgment itself, and not by what the judge may state in relation to it long after its rendition and in the trial of another case, in which the judgment in question was offered in evidence. Besides, the record shows that no issue had been joined on the intervention, nor even service made of the same.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court be annulled, avoided and reversed, the plea of *res judicata* overruled, and the case remanded to be proceeded with according to law.

No. 8408.

VICTORIA H. DICKSON AND HUSBAND VS. HANNAH P. DICKSON ET ALS.

A lease of property granted by the usufructuary expires when the usufruct ceases, whether such termination is caused by the death of the usufructuary, or by a judgment of court decreeing the loss of the usufruct for abuse.

The interest of the widow in community is residuary and can only be ascertained and defined after a settlement of the community. It follows, therefore, that mortgages granted by her before the liquidation of the community, cannot affect her obligation, upon the extinguishment of her usufruct, to account to her co-proprietors, and cannot prejudice the rights of the latter upon the entire mass of the community.

Dickson and Husband vs. Dickson et als.

A judgment cannot be disturbed on appeal between the Appellees and, therefore, as to them, remains *res judicata* independently of the action of this Court.

The judicial averments of a married woman, in her suit against her husband, of the sums received by him from her father for her account, estop her from afterwards disputing such sums in a partition suit between her co-heirs.

The donation made by the father to the common child, out of the community property, will be considered as made by both husband and wife when, after the father's death, the mother accepts the community. Previous Decisions affirmed.

In a partition suit, the heirs of age have an absolute right to demand a sale for cash for their shares of the common property.

A PPEAL from the Second Judicial District Court, parish of Bossier.
Drew, J.

Transferred to New Orleans by consent of parties. The original opinion was delivered at Shreveport, and the opinion on the Rehearing at New Orleans.

Looney & Elstner for Plaintiffs and Appellants.

Richard W. Turner for Mrs. Hannah P. Dickson, Defendant and Appellant :

First—The widow in community is the owner of one-half of the community property at the moment of the opening of the succession, subject only to the payment of the succession debts. C. C. Art. 2046; 3 An. 362, 489; 4 An. 389; 1 R. 149; 10 R. 13; 33 An. 584.

Second—Donations *inter vivos* or *causa mortis* cannot exceed two-thirds of the property of the disposer, having no children, leaving a father or mother. C. C. Art. 1494.

Third—A donation of community property by the husband to one of the children must be collated, one-half to the father's succession and one-half to the mother's. 5 N. S. 230, *Baillie vs. Baillie*.

Fourth—When a debt of a co-heir, co-proprietor or co-partner, if not due to the succession, the community, nor the partnership, its payment cannot be demanded in a partition of the succession. C. P. Art. 3.

Fifth—The heirs have no legal mortgage or privilege on the property of the administratrix the heirs are but ordinary creditors. C. P. 294; 12 R. 172.

J. D. Watkins for other Defendants and Appellants.

Lowry & Vance for Palmer Dickson, Defendant and Appellant :

First—Where the widow and heirs live upon succession property and enjoy it in indivision their possession is apparent, even though an administrator has been appointed. In such a case the administrator is simply the agent of the widow and heirs. His possession is that of the heirs. 12 An. 863, concurring opinion of Merrick, C. J.

Second—Where the widow and heirs agree that the family and property shall remain as the father left them, the property does not pass into the exclusive possession and become absolutely, that of the widow as usufructuary. 31 An. 741.

Third—Under such an understanding, if the heirs of age take and are allowed what they wish of the succession funds, the amounts so taken must be deducted from their shares on final partition. 31 An. 741; 33 An. 1150.

Fourth—And if, under such a state of circumstances, an heir takes and is allowed of the succession funds, an amount equal to an entire share of the estate, he is excluded from participation in a division of the remaining property on final partition.

Fifth—A divestiture of the usufruct annuls and cancels all leases and special mortgages imposed upon the usufruct property by the usufructuary. C. C.

Dickson and Husband vs. Dickson et als.

Sixth—The usufructuary owes to the heirs a support and educational advantages befitting their station in life.

Seventh—The gift of a draft upon a merchant for money is a manual gift, and is subject to no other formality than a real delivery. C. C. 1539; 22 An. 97.

Eighth—A judgment in favor of an heir, on opposition to an account filed by the administratrix, who is widow in community, operates as a judicial mortgage against her interest in the community real property, and, also, against the interest inherited by her, in the succession half, from one of her deceased children. 12 An. 864.

Ninth—Such a judgment enures only to the benefit of the heirs who oppose. 20 An. 360.

The opinion of the Court was delivered by

FENNER, J. This is a suit for partition to which the surviving widow and partner in community of Michael Dickson, deceased, and all the heirs of Michael Dickson, are parties.

Michael Dickson died in March, 1865, leaving a large succession of real and personal property, the whole of which was acquired during his marriage with Hannah P. Dickson, and, therefore, belonged to the community of acquets and gains subsisting between them.

Michael Dickson died intestate, and his widow opened his succession and was appointed administratrix of his estate, and also became the legal usufructuary of the entire estate.

Michael Dickson left the following heirs:

- 1st. Victoria H. Dickson, now Mrs. Thomas, the present plaintiff.
- 2nd. Michael A. Dickson, now dead, and represented here by Mattie L. Dickson, natural tutrix of his children.
- 3rd. Lizzie Dickson.
- 4th. Mary E. Dickson, now Mrs. Pillow.
- 5th. Emma Dickson, now dead, and here represented by Henry Czarneck, Executor.
- 6th. M. Hugh Dickson, now dead, and represented by W. L. Dickson, executor.
- 7th. Palmer Dickson.

Numerous claims and counter-claims are presented by the several parties for themselves and against each other; from the judgment rendered by the District Court *every party* has appealed, and an infinite number of perplexing legal questions have been raised and argued by the numerous counsel.

We shall endeavor, with clearness and brevity, to simplify the case as much as possible by settling the contested questions and laying down the principles which, in our opinion, should govern the partition.

I.

The first question to be settled is the termination of the widow's usufruct, which is a necessary condition precedent to the partition.

The legal usufruct expires on the death of the usufructuary. C. C.

606. Or it may be judicially extinguished, in consequence of the abuse of the enjoyment thereof by the usufructuary. C. C. 621.

The record exhibits the proceedings and judgment rendered in a suit for destitution of this usufruct, to which all parties to this suit were originally parties. That judgment was rendered on January 11th, 1881, and decrees "that the usufruct of the defendant, Hannah P. Dickson, heretofore held and enjoyed by her on the community property of the succession of her late husband, Michael Dickson, do terminate, and all her rights as usufructuary are hereby annulled and cancelled."

The suit was based on alleged abuse of the usufruct. Although Mrs. Dickson consented to the judgment, yet evidence was taken in the case, and the judgment is based not only on the consent but also "by reason of the law and evidence being in favor of the plaintiff."

The only one of the present parties having the slightest ground for disputing the binding force of this judgment is Henry Charnock, executor of Emma Dickson, deceased. Emma Dickson had herself been a party, but died in the interval between the bringing of the suit and the rendition of the judgment; and there seems to have been no revival of the suit as to him. Charnock appears simply as executor of the will of Emma Dickson. By that will Lizzie Dickson, who is unquestionably bound by the judgment, is made sole legatee of all rights in and to the Dickson estate. Further, Charnock, executor, in his answer in the present case, joins in the demand for partition, which is, in itself, an acknowledgment of the termination of the usufruct. For these reasons, we shall treat him as bound by the judgment.

II.

During the pendency of her usufruct, Mrs. H. P. Dickson had executed sundry leases of community real estate in favor of certain of the heirs, the terms of which have not yet expired, and which the other heirs demand should be decreed extinguished.

Art. 555 C. C. seems conclusive on this question. It provides that "the usufructuary may enjoy by himself, or lease to another, or even sell or give away his right, but all the contracts or agreements which he makes in this respect, whatever duration he may have intended to give them, cease of right at the expiration of the usufruct."

No distinction is suggested in the law between the cases of expiration by death and of expiration by judicial extinguishment for abuse; and the language of Art. 621 seems to leave no doubt that in the latter case, "the owner shall re-enter into the enjoyment of the property." We agree, therefore, with the District Judge that the leases terminated at the date of the judgment extinguishing the usufruct, viz., January 11th, 1881.

III.

Much learning and ingenuity are expended in the discussion of the validity and effect of certain conventional and judicial mortgages which were created by or against Mrs. H. P. Dickson, upon her interest in the community property. In the view we take of this case, these questions are of no importance. They are sufficiently disposed of by the following considerations:

The interest of the widow in community is residuary only, resembling the interest of an individual partner in the partnership property. It can only be ascertained and defined after a settlement of the marital partnership.

From the date of Michael Dickson's death, this entire estate, movable and immovable, has belonged to Mrs. Dickson and the heirs of Michael Dickson as partners in community. As legal usufructuary as well as administratrix, she has had the use and administration of the entire property, entitled under the law to all the revenues for herself, but under the obligation, at the termination of her usufruct, to produce, in such condition as the law requires, the property susceptible of perfect usufruct, and to account for that used or consumed by her in the exercise of the imperfect usufruct. All the property or its equivalent held by her in indivision, and administered and used by her, must enter into, and form the basis of, the settlement and partition; the debts due by the partnership must be paid; the accounts of the partners must be settled, and their respective interests ascertained, and according to these interests the partition must be made.

The residuary interest of the widow, thus finally ascertained and settled, is the only source to which her individual creditors, whether secured by mortgage or not, can look for satisfaction of their claims.

Inasmuch as, under these circumstances, the mortgages referred cannot affect the obligation of the administratrix and usufructuary to account to her co-partners, and cannot prejudice the rights of the heirs to have the interest coming to them under such accounting satisfied out of the entire mass of the community, it follows that the validity or invalidity of said mortgages are matters exclusively between Mrs. Dickson individually and the mortgagees, and do not figure as factors in this partition.

IV.

As to the amount for which the widow is responsible on account of the cotton and other movable effects of the community used and consumed by her, we find that matter fully settled by a judgment of the late parish court of Bossier parish, rendered in the proceeding entitled *Olympe Boisse and Husband vs. H. P. Dickson, Administratrix, and others.*

Dickson and Husband vs. Dickson et als.

In that suit an accounting was had, to which all the parties to the present suit were parties, and a final judgment was rendered decreeing that the widow was responsible for the whole of said personal property; fixing the gross value thereof at \$146,690; adjusting the credits to which she was entitled on account of community debts and charges at \$10,934 32; leaving a net residue of \$136,055 68 of community funds, for one-half of which she was adjudged to be accountable to the heirs at the termination of her usufruct, viz: the sum of \$68,027 84. The only person who ever appealed from this judgment was Olympe Boisse, and although in the opinion rendered by this Court on said appeal, certain expressions are found hostile to the correctness of the judgment of the parish court, that judgment was not, and could not have been, disturbed as between the widow and heirs, who were all appellees only. It has, therefore, acquired the force of the thing adjudged, and cannot be disturbed by us.

V.

The judgment just referred to also settled that the \$68,027 84, for which the widow was responsible to the heirs, was to be divided primarily between the seven heirs, giving to each one \$9718 55; and upon further issues properly joined, it was also determined that M. Hugh Dickson and Palmer Dickson had each received from their mother, on account of his share, the sum of fifteen hundred dollars; and that Michael A. Dickson had received from her, on account of his share, the sum of four thousand dollars. On these questions, also, that judgment is final; and the widow will be entitled to reimbursement of these advances out of the shares coming to these heirs.

VI.

As to the share of Mary E. Dickson, now Mrs. Pillow, we consider that the judgment of this Court upon the appeal taken by Olympe Boisse in the above case, settles conclusively that the widow had advanced to her a sum greater than her share in the entire succession, thereby extinguishing her claim. The effect of this is to entitle the widow to receive the entire share which would have come to Mrs. Pillow in satisfaction of the advances made to her as aforesaid.

VII.

As to the remaining heirs, Mrs. Thomas, Lizzie, and Emma Dickson, the judgment left open the question as to what, if any, advances had been made to them by their mother on account of their shares. Whatever may be the real truth of the matter, we find no sufficient evidence in this record to establish advances made to either of them with sufficient certainty to form the basis of a judicial allowance. No useful purpose would be served by stating and discussing the particular testimony

on the subject. It is sufficient to say that we have carefully weighed the evidence and find it too vague, contradictory and uncertain to overcome the positive statement of the widow herself that she made no such advances.

VIII.

As to the revenues of the property which had been leased to Lizzie Dickson, Mattie L. Dickson, tutrix, Palmer Dickson and M. Hugh Dickson, which have been retained by them since the termination of their leases by the extinguishment of the widow's usufruct, it is clear that they must account to the community for the rents and revenues thereof, to be ascertained under proper proceedings for that purpose.

IX.

As to the collations to be made by the several heirs on account of advances received from their deceased father, we have carefully considered the testimony, and content ourselves with saying that it does not establish the fact of such advances with sufficient certainty to enable us to decree the collation thereof, except in the case of Mrs. Thomas. Her judicial allegations in the suit against her husband for separation of property, which she is conclusively estopped from disputing, establish that she received from her father the sum of eight thousand dollars. If injustice be done in requiring her to collate, while exempting other heirs, it is attributable to the fact that she has herself furnished the conclusive proof of the advance to her; while the charges sought to be enforced against her co-heirs are sustained only by uncertain and contradictory evidence of ancient transactions between persons now defunct, whose relations in business affairs were such as to leave the true character of the transactions inextricably veiled in doubt and uncertainty. To the judicial mind things not proved must be treated as things which do not exist.

We consider it sufficiently proved, however, that all the property of Michael Dickson was community property, and that the advance made by him to Mrs. Thomas was made out of that community. Mrs. Dickson having accepted the community, we consider the doctrine well settled that such a donation "is esteemed a donation of both parties, and must be collated, one-half to the father's, and one-half to the mother's succession." Succession of Montegut, 2 An. 634; Baillio vs. Baillio, 5 N. S. 228.

She is, therefore, now called on to collate only one-half the donation, and will collate the other half only to the succession of her mother.

X.

M. Hugh Dickson and Emma Dickson having left no descendants, there can be no doubt that their mother is a forced heir to one-third of

their respective estates. Inasmuch, however, as their successions have been opened, and are under administration by duly qualified executors, and as the forced portion is only ascertainable after settlement of the successions, we cannot make a partition thereof in this case, but will award their entire shares to their respective representatives, reserving the widow's rights to assert her claims as forced heir in said successions.

XI.

The evidence satisfies us that the partition of the immovables can only be satisfactorily effected by sale; and we see no reason to disturb the terms and conditions prescribed by the District Judge.

XII.

We think the sums allowed to L. M. Nutt, Esq., for professional services to the administratrix, and to B. F. Fort, Esq., as curator *ad hoc*, are proper charges against the active mass of the succession.

XIII.

We think the widow is entitled to her commissions of \$4292 42, which will lessen by that amount the sum of \$136,055 68, for which she is indebted to the community, leaving so due \$131,763 26.

XIV.

Before proceeding to frame our decree, after having thus settled the various questions raised by the parties, we will now make a general *résumé* of operations by which this partition should be effected.

Inasmuch as it involves a partition of the whole community, between the widow and the heirs, as well as between the heirs *inter se*, the active mass should be composed of the entire community estate, which consists of:

1st. The amount for which Mrs. Dickson is responsible on account of cotton and other movables, as heretofore determined, viz: \$131,763 26.

2nd. The notes and cash received from the sale of the immovables.

3rd. The revenues due by Lizzie Dickson, Mattie L. Dickson, tutrix, Palmer Dickson, and W. L. Dickson, executor, for rents and revenues of property formerly leased by them, and used and occupied by them since January 11th, 1881; but these items being as yet undetermined, they will be provided for in the decree without figuring in the present partition.

This active mass should first be equally divided between the widow for one-half and the heirs for the other half.

The half due the heirs should then be divided into seven equal parts, and one-seventh assigned to each heir.

The seventh thus falling to Mrs. Pillow should then be transferred and added to the share of the widow as owner thereof.

From the seventh falling to Palmer Dickson, should then be deducted the sum of \$1500; from that falling to M. Hugh Dickson should be deducted the sum of \$1500, and from that falling to Mattie L. Dickson, tutrix, should be deducted the sum of four thousand dollars; and these several sums should be transferred and added to the share of the widow in reimbursement of the sums advanced by her to these several heirs.

From the share of Mrs. Thomas should be deducted six-sevenths of four thousand dollars, and one-seventh should be carried and added to the share of each one of the other six heirs.

These operations will constitute the shares coming to the widow and the several heirs respectively, exclusive of the unsettled rents and revenues above referred to.

It is, therefore, ordered, adjudged and decreed that, in so far as the judgment appealed from declares the leases named therein to be extinguished and avoided after the 11th day of January, 1881, and condemns the lessees therein named to pay and return to the succession the rents and revenues of the lands and property from that date; and in so far as the said judgment orders the sale of the property therein described and fixes the terms and conditions thereof, and appoints and defines the powers of experts to aid in effecting said sale; and in so far as the said judgment orders a partition of the entire mass of the succession of Michael Dickson and names the notary and the experts who are to make such partition; the judgment appealed from be now affirmed; and that, in all other respects, the said judgment be annulled and set aside; and, proceeding to render such further judgment as should have been rendered by the lower court, it is now ordered, adjudged and decreed that Hannah P. Dickson, administratrix and widow in community, be recognized and declared to be a debtor of the community subsisting between herself and the heirs of Michael Dickson in the sum of one hundred and thirty-one thousand seven hundred and sixty-three dollars and twenty-six cents. That the notary public, in making the partition, shall proceed as follows: He shall form the active mass of the community, to be composed 1st, of the \$131,763 26, due as aforesaid by Hannah P. Dickson, and 2d, of the total amount of cash and notes resulting from the sales of property herein ordered; from said mass he shall first deduct the sum of fifteen hundred dollars to be paid to L. M. Nutt, Esq., for attorney's fees herein allowed, and the sum of fifty dollars to be paid to B. F. Fort, Esq., as curator *ad hoc*, and the sum of two hundred and fifty dollars to be retained for payment of all costs of this proceeding; he shall then divide the remaining mass into two equal shares, one to be assigned to Hannah P. Dickson, as partner in community, the other to be assigned to the heirs of Michael Dickson, the deceased partner; he shall then divide the last named share or half, into seven equal por-

Dickson and Husband vs. Dickson et als.

tions to be assigned respectively to the said heirs, viz: to Victoria H. Dickson, now Mrs. Thomas, one-seventh; to Lizzie Dickson, one-seventh; to Henry Charnock, executor of Emma Dickson, one-seventh; to Mattie L. Dickson, tutrix of M. A. Dickson's heirs, one-seventh; to W. L. Dickson, executor of M. Hugh Dickson, one-seventh; to Palmer Dickson, one-seventh; to Mary E. Dickson, now Mrs. Pillow, one-seventh; he shall then transfer and add to the original share of Mrs. H. P. Dickson, the one-seventh share assigned as above to Mary E. Dickson, now Mrs. Pillow, thus extinguishing her interest; he shall then subtract from the shares of Palmer Dickson and M. Hugh Dickson respectively, the sums of fifteen hundred dollars each and add the said sums to the share of Mrs. H. P. Dickson; he shall then subtract from the share of Mattie L. Dickson, tutrix of M. A. Dickson's heirs, the sum of four thousand dollars, and will transfer and add the same to the share of Mrs. H. P. Dickson; he shall then deduct from the share of Mrs. Victoria H. Thomas, six-sevenths of four thousand dollars (which sum she is hereby condemned to collate to the heirs of Michael Dickson), and of said six-sevenths, he shall transfer and add one-seventh to the share of each of the other heirs of Michael Dickson, except Mrs. Mary E. Dickson Pillow, whose seventh shall be added to the share of Mrs. Hannah P. Dickson. The shares resulting to each party from the above operations will constitute the ultimate interest of each under this partition. It is further decreed that in case Mrs. H. P. Dickson shall fail or refuse to pay or deliver for actual partition the sum of \$131,763 26 adjudged to be due by her to the active mass of the community, her ultimate share as above ascertained shall be compensated and extinguished *pro tanto*, by said sum and amount, and she shall take so much less.

It is further ordered, adjudged and decreed that Lizzie Dickson, Mattie L. Dickson, tutrix, W. L. Dickson, executor, and Palmer Dickson, owe to the active mass of the community the rents and revenues of lands formerly leased by them respectively, and used and cultivated by them subsequent to the 11th of January, 1881; that this cause be remanded to the lower court for the purpose of further proceedings in order to ascertain and liquidate the sums so due by them respectively, without, however, delaying the execution of this judgment, and the partition in other respects; and said sums when ascertained shall form part of the active mass of the community, and shall be distributed in the same manner and subject to the same principles herein prescribed for the partition of the other parts of said active mass, and should the said amounts not be ascertained prior to the completion of the partition herein ordered, the judge of the District Court, before allowing the said parties to take the several shares allotted to them in the said partition, shall require them either to leave in the hands of the court a sufficient

amount of said several shares to secure the payment of their said indebtedness when ascertained, or otherwise to secure the same to the satisfaction of the court, and that the costs of the lower court and of this appeal be paid out of the common fund of the succession.

ON APPLICATION FOR REHEARING.

The only complaints made of our decree are the following :

1. Mrs. H. P. Dickson complains that there is a seeming ambiguity in our decree as to the effect given by us to the judgment of the Bossier District Court of 11th January, 1881, destituting her of her usufruct.

The only occasion we had for referring to that judgment, in this case, arose from the fact that the destitution of the usufruct decreed thereby was a necessary condition precedent to the maintenance of this suit for partition. Therefore, our allusions were confined to this element of that judgment. It should be needless to say that we neither made or intended any discrimination against, or reflection upon, the validity of that judgment in any other respect.

2. We are asked by several of the parties to amend the decree so far as it affirms that portion of the judgment of the District Court, directing the sale to be made for cash to the extent of the interests of some of the heirs and on terms of partial credit as to the interests of the remaining heirs.

The right of heirs of age and present to require the sale to be made for cash "for a sufficient sum to cover the interests coming to them," seems to be quite absolute and unqualified under the terms of C. C. 1342. In absence of any complaint by those heirs themselves, we must presume that they made the demand and that the judge acted upon it.

3. In view of the fact that a part of the property is situated in the parish of Caddo, and part in the parish of Bossier, we are asked to modify that part of the decree which orders the whole of the property to be sold, at the same time, by the sheriff or an auctioneer of the parish of Bossier. It is reasonably urged that the property should be sold in the parish where it is situated and on different days. We acquiesce in the propriety of this prayer and shall amend our decree accordingly ; and would have so ordered in our first decree, had the point been urged.

It is, therefore, ordered that so much of our decree as affirms that portion of the judgment appealed from which orders that "the entire property, real and personal, belonging to the succession of Michael Dickson, be sold by the sheriff of Bossier or any auctioneer in Bossier parish," be now annulled and set aside ; and it is now ordered and decreed that the above cited portion of the judgment appealed from be amended so as to order that the property situated in the parish of Bossier be sold by the sheriff or any auctioneer of said parish, and that the property

State ex rel. Pugh vs. Judge of Twentieth Judicial District Court et al.

situated in the parish of Caddo be sold by the sheriff or any auctioneer of said parish, and that the sales in said respective parishes be made upon different days and with sufficient interval between them to enable bidders to attend both sales.

And it is ordered that, in all other respects, our former decree remain undisturbed.

The Chief Justice takes no part in this decision, not having participated in the original opinion.

No. 8317.

THE STATE OF LOUISIANA EX REL. THOMAS B. PUGH, CORONER AND ACTING SHERIFF, ETC., VS. THE JUDGE OF THE TWENTIETH JUDICIAL DISTRICT COURT ET AL.

A judgment of this Court, declaring a State officer ineligible and his office vacant, commanding nothing to be done and upon which no writ issues, needs not be recorded in the court below to produce its legal effect. Such judgment becomes, upon its rendition, instantly operative.

In the case at bar, the judgment of this Court was rendered on a rehearing and no delay was necessary for its finality.

The writ of Error from the Supreme Court of the United States, was necessarily issued in the premises *after* the judgment of this Court had become final and definitive and produced its legal effect. Such writ of Error could not, therefore, act as a *superseas*, which, under the legislation of Congress and jurisprudence of the U. S. Supreme Court, is not intended to interfere with the judgment of a State Court when the latter has already received its execution, or, as in the instant case, has produced its effect.

It does not appertain to the inferior courts or judges of the State to determine or recognize the operation and effect of a writ of Error directed to this Court by the Supreme Court of the United States.

This case is a proper one for the exercise, by the writs of Mandamus and Prohibition, of the plenary powers granted to this Court by Article 90 of the Constitution.

APPLICATION for Writs of Mandamus and Prohibition.

Pugh & Howell for the Relator:

First—The judgment of this Court of the 28th of May, in the matter of State of Louisiana ex rel. Howell vs. A. J. Echeverria, on rehearing, was final and absolute at the instant of its rendition. Sec. 1007 R. S. U. S. has no application to judgments and executions of State Courts; it refers solely to United States Courts. (4th Otto U. S. 52.)

Second—The decree in said matter was self-executory; it ordered nothing to be done; it simply declared existing facts, defined the law, and the law executed itself. Const. 1879, Art. 118.

Third—The suspensive appeal taken by relator herein on the 4th of June, kept in full force and effect the first order for the books and keys, etc., granted herein, and vested this Court with full jurisdiction of the cause, and all subsequent orders issued by the District

State ex rel. Pugh vs. Judge of Twentieth Judicial District Court et al.

Judge were absolute nullities, and an infringement upon the appellate jurisdiction of this tribunal. 33 An. 929; 32 An. 1278, 1185; 19 L. 172; Hennen, p.—.

Fourth—Judges cannot delegate their judicial powers to any one; but must exercise them personally. 27 An. 663.

R. N. Sims and Walter Guion for the Respondent:

The judgment of this Court in the Echeverria case (No. 8123,) could not become executory until after it had been filed in the clerk's office of the District Court. C. P. Arts. 617, 618, 619, 623, 915; Green vs. Van Buskerk, 3 Wall. 450; Freeman on Execution, § 13; Wells vs. Merz, 23 An. 392.

The defendant, Echeverria, lodged his writ of error and filed his bond for a supersedeas on the morning of the 3d of June. From that moment this Court was divested of all jurisdiction and control of the case or any part thereof. State ex rel. Jumel vs. Johnson, 29 An. 403.

No attempt was made by the coroner to act in the place of the sheriff until after the writ of error had been granted and the bond filed. (Affidavit of Alfred Tete).

When the ex parte order of the District Judge was served on the sheriff's deputy at 3 o'clock in the afternoon on the 3d of June, this Court no longer had jurisdiction.

"Writs of error from the Supreme Court in cases authorized by law, shall be issued in the same manner and under the same regulations, and shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States." U. S. Revised Statutes, Sec. 1003; 29 An. 403, Draper vs. Davis; U. S. Supreme Court; Central law Journal, Jan. 28th, 1881, p. 91; Desty's Federal Procedure, p. 215.

The judgment appealed from is suspended, as a matter of law under the act of Congress by filing the supersedeas bond. Goddard vs. Orderay, 94 U. S. 672; Williams vs. Bruffy, 102 U. S. 248. Hennen, p. 73, (effect of appeal) No. 3 and cases cited. 11 An. 738; 5 La. 314; 14 La. 392; 10 Rob. 147-419.

In a late case this Court said: "Although we are the creatures of the Constitution of the State, the judicial trust confided to us embraces a faithful administration of all the laws of the land; and our duty, as well as our solemn oaths, bind us to obey equally the Constitution of the United States and the Constitution of this State." Saloy et al. vs. City of New Orleans, 33 An. 84.

The decree of this Court in the Echeverria case being suspended, there was no vacancy in the office of sheriff and the coroner was without authority, under the law, to act for or in place of the sheriff.

After the writ of error was perfected, by pretending to act as sheriff, he became a mere trespasser, liable in damages for his tortious acts. Durbridge vs. Wentzel, 17 An. 20; Freeman on Executions, § 105; Supersedeas signifies: Suspend, set aside, stay. Webster's Dict. Verbo Supersedeas.

In the Jumel case, 29 An. 403, this Court refused to execute the judgment pending the writ of error.

"It is better for individuals, better for the public to suffer the inconvenience of delay and temporary suspension in the enforcement of a right than to incur the risk of depriving one of the right to have his complaint heard and determined in the highest judicial tribunal having jurisdiction." 29 An. 403.

An application for a writ of error, in proper form, was filed in this Court on the 31st of May, but was refused by the Chief Justice. The Supreme Court of the United States having granted the writ of error and approved the bond for a supersedeas, on the 2d of June, the effect of the writ related back to the time when the application was originally made to this Court.

The refusal to grant the writ then stood as if the order denying it had been reversed and an order entered granting the writ. Williams vs. Bruffy, 102 U. S. 248.

The case of Doyle vs. Wisconsin, 94 U. S. 50, is not in point. In that case, the order or mandate of the Supreme Court had been executed before a writ of error was granted, and the application for the writ was filed nearly sixty days after the execution of the decree.

State ex rel. Pugh vs. Judge of Twentieth Judicial District Court et al.

In case of a vacancy in the office of sheriff, the coroner does not become sheriff, but merely acts for and in the place of the sheriff. Const. Art. 118.

The coroner's status is the creature of the law, and no act that he might do could in any manner add force to the decree of this Court in suit 8123. And we contend that the moment the supersedeas bond was filed, the coroner was divested of all authority to act for or in the place of the sheriff of the parish of Assumption.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The relator applies for a *mandamus* to compel the defendants to recognize him as the acting sheriff of the parish of Assumption, and for a *prohibition* to prevent them from interfering with him in that capacity. He substantially avers that, on the rendition of the judgment of this Court, on the 28th May last, in the case of State ex rel. Howell vs. A. J. Echeverria, 33 An. 723, he became entitled to discharge the functions of sheriff of said parish; that he took possession of the room, papers and keys pertaining to that office; that the District Judge for the Twentieth Judicial District has entertained proceedings from the defendant cast in said suit, which obstruct the effect of the judgment of this Court, and which restore said defendant to the office from which he was excluded by this Court, to the prejudice of relator who is entitled to fill the office until the vacancy declared to exist shall have been filled in the manner prescribed for by law; that by acting as they have done the judge and said defendant have become guilty of a contempt of the authority of this Court, and should be punished accordingly; that they should be commanded to recognize him, the relator, as such acting sheriff and prohibited from interfering with him as such, and that all the orders and decrees made by the judge, which prevent him from discharging the functions of the office, and which restore the ousted defendant thereto, should be annulled to all ends and purposes. On this application the defendants were ordered to comply with the prayer of the petition or show cause to the contrary, and a preliminary restraining order was made.

The defendants have answered purging themselves from all intention to commit any act of contempt, and averring that the acts sought to be avoided are valid, having been done in furtherance of law, the judgment of this Court never having become operative for want of recording in the lower court, and because of the granting of a writ of error removing the cause to the Supreme Court of the United States; that the relator had no authority to assume to discharge the functions of the office and to take possession of the incidents thereof; that the District Judge, on the application made to him, had a right to enjoin the relator from acting as such sheriff, and from interfering with defendant in the discharge of the duties of that office.

As disclosed by the pleadings and the record, the facts of the case are the following:

On the 28th of May last, on a rehearing granted in the said case of the State ex rel. Howell vs. Echeverria, this Court annulled its previous judgment. It decreed the defendant Echeverria ineligible to the office of sheriff of the parish of Assumption, and declared that office vacant.

On the 31st following, the defendant, upon averments, applied to the Chief Justice of this Court for a writ of error to the United States Supreme Court, but his application was declined the same day, the case not being considered as one within the appellate jurisdiction of that tribunal.

On the 2d of June following, the relator, who is the coroner for said parish, with an authentic copy of the mandate or judgment of this Court in hand, applied to one claiming to be the deputy of the defendant Echeverria, then absent, for the possession of the room, books and papers of the office, and for the keys of the court-house and jail, claiming to be, in his capacity of coroner, the acting sheriff of said parish in consequence of the vacancy declared by this Court by said judgment to exist therein. This application was refused, and was not to be granted unless upon an order obtained from the District Judge directing the delivery.

On the same day the relator, on averments, prayed for the order, but the judge, taking the matter under advisement, made the order on the following day, viz: the 3d of June.

On presentation of that order the same day the possession asked was delivered.

On the 2d of June, an application having been made by the defendant Echeverria to his Honor, Associate Justice Woods of the Supreme Court of the United States, a writ of error had been granted, and the required bond had been furnished and accepted.

On the 3d of June these proceedings were lodged in the clerk's office of this Court.

On the same day, after the order of the District Judge for delivery of the incidents of the sheriff's office had been complied with, the defendant Echeverria, on averment of the writ of error granted and lodged as aforesaid, and of rights claimed in consequence thereof, applied for and obtained an order rescinding the decree for the possession of the room, books and keys aforesaid, and recognizing him as entitled to continue in the functions of sheriff of said parish. The relator then applied for, obtained and perfected a suspensive appeal from the rescinding order. On the other hand, the defendant Echeverria sought, obtained and perfected a suspensive appeal from the order of delivery.

On the 17th of June, on averments, the defendant Echeverria sought

and obtained, from the District Judge, an order directing the relator to deliver to him the room, books, papers and keys pertaining to the said office, and enjoining him, the acting sheriff, from interfering with him, Echeverria, as the sheriff of said parish of Assumption. Upon the rendition of these orders Echeverria assumed to discharge the duties of such sheriff, and to take possession of the paraphernalia of the office. It is at this juncture that the relator laid his complaints before this Court.

We have stated the substantial averments of his petition, the orders rendered thereon, and the main defenses set up adversely to his demands.

Before proceeding to the consideration and determination of the case presented, we propose to dispose of the rule for contempt. From the showing made by the defendants, we think we are authorized to release them from the charge. 24 An. 213.

We will add, that we deem it proper to say, that, in the present proceeding, we cannot be asked to pass directly upon the correctness of the two orders from which suspensive appeals have been taken returnable to this Court and that we will not do so, although we may *ex necessitate*, unavoidably, have, in a collateral way, to express an opinion as to their validity.

Those matters being thus disposed of, we will now proceed to consider the questions presented for determination by the litigants. We take it, that the question submitted for solution is substantially : Whether the District Judge, made defendant herein, with said Echeverria, was authorized by law to entertain and countenance, as he did, the proceedings inaugurated by said Echeverria, under the averments touching the writ of error, and thus to prevent the judgment of this Court ousting said Echeverria from said office and declaring it vacant—from producing its full effect ; in other words, whether the District Judge, by acting as he had, has or not exceeded the bounds of his authority and usurped a jurisdiction which his Court could not legally exercise.

The determination of that question depends solely upon : whether the relator, as coroner, was or not lawfully and actually in possession of the office of sheriff of the parish of Assumption, when the writ of error was lodged in this Court.

From the view which we have taken, it is immaterial whether the copy of the judgment of this Court was or not filed or recorded in the lower court on the 2d or 3d of June, or was ever at all filed and recorded.

We consider that a judgment in which the State, representing the whole commonwealth, is concerned, which orders nothing to be done, which forbids nothing from being done, upon which no writ can issue, the effect which could not be kept in suspense by any omission on the part of any one to have it filed and recorded,—did not require any filing

and recording in order to produce the effect which, under the law and the Constitution, it was bound to have.

We consider that, upon its rendition, such judgment became final and instantly operative; that consequently, by the force of the law alone, Echeverria was at once ousted from the office, by being declared ineligible thereto; that the office by being declared vacant, was so absolutely; that it ceased to be filled by any incumbent; that by the express provision of the Constitution, the coroner had authority to replace the ousted *de facto* functionary and to act in his place until the vacancy declared to exist would be filled as directed by law.

The proceedings for the writ of error necessarily took place *after* the judgment of this court had become final and definitive and, in the abstract, had produced its effect. They could not and therefore did not undo what had *previously* taken place. Things or facts as they sprung into existence by the force of the law on the 28th of May, when our judgment was rendered, could not be and were not altered by the *subsequent* application for, and granting of, the writ of error, or by any other proceeding in the case.

The judgment declaring Echeverria ineligible and pronouncing the office vacant, was rendered *on a rehearing*. It became instantly final and absolute without the expiration of any delay subsequent to its rendition. The Governor would have had the power, by appointment, to fill the declared vacancy. 24 An. 622. As he did not then do it, the coroner, *eo instanti*, by reason of article 118 of the Constitution, had the right to replace the ousted sheriff *de facto*, and to act in his place until the vacancy was legally otherwise filled.

The effect of the judgment, which is one of absolute ouster, under a special statute, R. S., was to constitute, as it did, a full and complete amotion from office of the party thus removed of all official authority and to exclude him altogether from office holding. *It is not a judgment as must be regarded as an effectual bar to proceedings to procure a restoration to office.* High on Ex. Rem., p. 540, §§ 748, 750; p. 546, § 756; 8 Mod. Rep. 332; 40 Geo. 164; 11 Mod. Rep. 390.

Such a judgment decrees the *status* of a person and is not susceptible of execution by writ. It is one which takes immediate effect and requires no action to put it in operation. The *status* being determined, the consequences follow. By the rendition of that judgment, Echeverria was pronounced ineligible to the office to which he claimed to be entitled; he was instantly excluded from it and it was declared absolutely vacant.

Under article 118 of the Constitution, framed in contemplation of the occurrence of precisely such a case, the coroner was fully empowered to act for and in place of the sheriff until the vacancy was filled,

and he had authority to demand, *eo instanti*, in his capacity of acting sheriff, not the office which the Constitution had given him and which he held, but the possession of the room and the delivery of the books and keys belonging to it. 7 How. N. Y. Pr. 282; 6 Abbott N. Y. Pr. 220. In other words, the moment that the judgment of this Court blew out of the incumbent all official character and existence, the Constitution breathed both in the person of the coroner, who thereby at once became the acting sheriff of the parish.

The refusal of the late incumbent to make such delivery might have been met with a proceeding by mandamus to compel the surrender, C. P. 833; and is made a misdemeanor punishable by fine and imprisonment. R. S. 2588, 2599.

The articles of the Code of Practice, 617 *et seq.*, which declare that appellate courts must send their judgments to the inferior courts to be executed, and that such judgments cannot be executed unless recorded in the court which first had cognizance of the cause, refer, *vi terminis*, to judgments which order something to be done, which requires execution, for the enforcement of which writs in the name of the State have to be issued, and not to judgments which, as in the instant case, are self-operative and admit of no carrying out by process of law.

This distinction is manifest, and was announced as existing ever since 4 L. 325, where, in the Curtis case, Mr. Justice Porter, as the organ of the Court, said: "The enregistry of the judgment in the inferior tribunal is only necessary to obtain *execution*, but the decree derives no additional force from that formality, no more than placing an execution in the hands of the sheriff would add to the effect of a judgment of the District Court. The obligations of the parties commenced from the moment the judgment became final, and any act done by them inconsistent with it is contrary to those obligations and can confer no right on them."

This saying is the more remarkable and cogent, as, at the date of the decision (1832), the Code of Practice expressly required (which it does no more since 1852, Act No. 305), a motion in open court to render executory the judgment of an appellate court.

We do not wish to be understood as saying the judgment of ouster by the District Court in Assumption parish could become executory when signed, and that before the ten days following the signature had expired, within which the defendant could take a suspensive appeal, the coroner could have assumed the functions of the office of sheriff in place of the ousted incumbent. The effect of judgments rendered by such a court and that of judgments rendered by this Court are regulated by different provisions of law.

The titles of the coroner to the office were the final, absolute judg-

ment of this Court in force at the time, ousting the defendant, declaring a vacancy as complete as in the case of death or resignation, and the Constitution of the State, which authorized him, in cases of vacancy, to act as sheriff until the vacancy shall be filled. Both constituted his commission, his authority to demand possession of the accessories or incidents of the office. Before them the defendant should have promptly yielded. Resistance on his part and continuance in tenure made him once more an intruder. 15 Minn. 221; 32 H. 246; 15 Cal. 120; 60 Barb. N. Y. 234 (1871).

Title to an office is one thing and title to the accessories or incidents of that office is another. C. P. 833; 21 An. 18, 187, 338; 2 An. 401; 12 An. 719; High on Ex. Rem., pp. 61 and 73; Dillon on Munic. Corp., § 684.

It is, therefore, apparent that, on the 28th of May, the judgment of this Court had gone into effect and that, by accepting the discharge of the new functions superadded to his duties as coroner and imposed upon him by article 118 of the Constitution, the relator was, by the power of the law, in possession of the vacant office, although he had not as yet obtained delivery of its accessories, which took place on the 3rd of June following.

The condition of things in existence *before* the proceedings for the writ of error had been perfected, therefore, was a vacancy declared by a final judgment of this Court, filled temporarily by the coroner, under article 118 of the Constitution.

The proceedings were not consummated until the writ was lodged in this Court on the 3rd of June, therefore until *after* the judgment in question had taken effect, *after* the coroner had accepted the discharge of the new functions, until *after* the declared vacancy had been actually filled. It cannot, therefore, be claimed that what had thus been done *before* the writ had been lodged, has been, or has to be, undone, and consequently that the ousted ineligible defendant should be restored to the office from which he was judicially absolutely excluded. "The judgment (rendered to that end by this Court) is such as must be regarded as an effectual bar to proceedings to procure a restoration to office." High on Ex. Rem., p. 546, § 756.

We do not understand that it ever was contemplated by Congress or by the Supreme Court of the United States, as the highest judicial expounder of the Constitution and laws of the United States, to interfere at all, by the legislation on this subject, with the practice of the States, as to the effect of their judgments.

Indeed, in the case of *Doyle vs. Wisconsin*, 94 U. S. p. 50, that exalted tribunal, well realizing the magnitude of the subject, wisely held, that section 1087 of the R. S., which, as amended by the Act of February

State ex rel. Pugh vs. Judge of Twentieth Judicial District Court et al.

18, 1875, provides that, where a writ may operate as a *supersedeas*, execution shall not issue until the expiration of ten days after the rendition of the judgment, has reference to the judgments of the courts of the U. S. and, therefore, did not apply to State courts.

In 19 Wall. 664, the same tribunal had even held that, if an execution was issued upon a judgment in the courts of the U. S. *after* the expiration of ten days, a *supersedeas*, *afterwards obtained*, would not interfere with what had been done, but would only prevent future proceedings.

A writ of error is "brought," not when it is allowed, but when it is filed in the court which rendered the judgment. 11 How. 294. It is then only that it can be enforced. 10 Wall. 273; 1 Woods R., 51, 234.

The reason is obvious. It is, that by the lapse of that delay, the judgment creditor had acquired a right to take steps for the enforcement of his judgment, and the proceedings subsequently had could not have the virtue of undoing what had been done by him in the exercise of that right, under a writ to which he was entitled; thus consecrating the principle that what has been done in consequence of an executory judgment and in furtherance of law, cannot be destroyed or annihilated or even altered, by a *supersedeas* subsequently obtained. 24 An. 403; 29 An. 403.

Such being the law and the jurisprudence of the United States, as to cases originating and conducted in their own tribunals, how can it be claimed, with any plausibility, that State tribunals are not equally protected, but are forced in a worse predicament, regardless of local constitutions and laws?

The authorities relied upon by the defendants cannot, therefore, receive the application claimed for them. 2 How. 74; 3 Wall. 450; 6 Otto, 672; 23 An. 392; 24 An. 600; 29 An. 403; 94 U. S. 672; 102 U. S. 248.

If the judgment of this Court, which pronounced Echeverria ineligible, which declared vacant the office to which he claimed to be entitled, be one which is self-operative, which does not, therefore, require recording in the court of first instance to produce full effect; if, upon the rendition of such judgment, under the Constitution, the coroner had authority to act in place of the ousted sheriff until the declared vacancy was legally filled, and if he accepted and entered upon the discharge of his functions as acting sheriff, *before* the proceedings for a writ of error were actually perfected and lodged in this Court, the irresistible conclusion is, that the condition of things or the state of facts *then* in existence had to remain in *statu quo* until the declared vacancy were filled or the judgment of ouster reversed and Echeverria recognized as entitled to the office from which he had been excluded.

But, even if it were true that the effect of the granting of the writ of

State ex rel. Pugh vs. Judge of Twentieth Judicial District Court et al.

error and the lodging of it in this Court, would be to undo what had been done (a proposition which we in no manner concede), it certainly did not appertain to the defendant to assert, and to the judge of the lower court to recognize such effect, and thus to prevent the judgment of this Court from producing the consequences which, under the law, were to and did flow from it.

It was the duty of the District Judge and of the defendant to respect the judgment of this Court, the former as a member of the State judiciary, subordinate and ancillary to the authority of this Court, the latter as a litigant bound by the finding of this Court against him, until such finding were reversed. Neither had authority to nullify and set at naught, or even interrupt or suspend, the effect which that judgment was entitled to produce. In obstructing the effect of that judgment, both have committed a grave and almost a reprehensible mistake. The writ of error is directed in the name of the Supreme Court of the United States to the Judges of the Supreme Court of Louisiana, and is not addressed to the judge of the District Court for the Twentieth Judicial District sitting in Assumption parish. To this Court alone it appertains primarily to determine and regulate its effect, subject to correction by superior but not by inferior authority.

In rescinding the order given by him for the delivery of the incidents of the office of sheriff to the relator, in allowing a suspensive appeal from that order for possession, in directing the relator to turn over to the defendant those incidents and in enjoining him from interfering with the defendant as sheriff, the judge *a quo* has assumed to suspend, if not to nullify, the effect of the judgment of this Court. He has thereby clearly exceeded the bounds of the jurisdiction of his court and has usurped the exercise of powers with which the law has not clothed him and which are vested in higher authority.

The relator is clearly entitled to relief. He has applied for both a *Mandamus* and a *Prohibition*.

We deem that, in the sound exercise of the plenary powers vested in this Court, by article 90 of the Constitution, which provides that it "shall have control and general supervision over all inferior courts,"—we can grant him both reliefs.

It is true, as a rule, that a *mandamus* does not issue, unless to coerce the performance of a ministerial duty, but that rule, like all others, has its exceptions. Shortly after organization of this Court under the present Constitution, we had occasion, in two cases brought to our notice, to consider the object and purport of that constitutional provision (Art. 90), and to lay down some general rules by which we were *ordinarily* to be guided. We then prudently made an "express reserve of the rights to make exceptions to those general rules in cases in which

State ex rel. Pugh vs. Judge of Twentieth Judicial District Court et al.

urgent considerations of public policy might demand our interference. 32 An. 553.

The case now before us is one in which the whole community is highly interested, one in which,—under constitutional provisions adopted and under laws enacted, to prevent office-holding by a certain class of persons—an erring magistrate and an ineligible and ousted incumbent are asked to be prevented from arresting and thus nullifying the effect of a final judgment of this Court and paralyzing a constitutional provision.

The object of the writ of *Mandamus* is to prevent a denial of justice. It should, therefore, be issued in all cases where the law has assigned no relief by the ordinary means and where justice and reason require that some mode should exist of redressing a wrong, or an abuse of any nature whatever. It issues at the discretion of the court, even where the party has other means of relief, if the slowness of ordinary legal forms is likely to produce such a delay, that the public good and the administration of justice will suffer from it. C. P. 830, 831.

We think that, under the emergencies which have arisen, the public interest requires speedy and efficacious remedies to suppress the disorders which have been brought about and to restore things to their normal condition. We, therefore, feel empowered to direct the defendants to recognize the relator as the acting sheriff of the parish of Assumption and not to interfere with him, in that capacity, provided that the declared vacancy which the Constitution authorized him to fill, has not been heretofore filled, in a manner pointed out by law.

Under the unprecedented circumstances of this case, we consider that it was the duty of the District Judge, not only to recognize, as he at first did, the relator as such acting sheriff, but also after such recognition, to have abstained from interfering with him, at the instance of Echeverria, his co-defendant herein, as he has done. It is not pretended that, but for the writ of error lodged in this Court, the relator would not have had the right of replacing the ousted sheriff.

The defendants have, without authority, overleaped the barrier which our judgment, the law and the Constitution had raised before them. They must now submit to the solemn behests of justice.

It is, therefore, ordered, adjudged and decreed that the alternative writ of *mandamus* and the provisional writ of prohibition herein issued be made peremptory, at the costs of defendants.

No. 8211.

SUCCESSION OF WALTER O. WINN. OPPOSITIONS TO ACCOUNT OF EXECUTOR.

An executrix who has, by error, acknowledged in writing on the back of a note that the same was still due, may be heard as a witness to prove that the written date of such acknowledgment is false and that, in fact, she signed the acknowledgment at a time when the note was already prescribed.

Under the principle of *stare decisis*, this Court will not disturb the rule established by numerous Decisions, that prescription was not suspended during the late civil war in this country.

This Court does not consider the rule of suspension of prescription established in section 1048 of the United States Revised Statutes, as intended by Congress to be acknowledged and enforced by State Courts. The isolated case of *Stewart vs. Cohn*, 11 Wall. 493, is not acknowledged as authority, and that of *Aby & Catchings vs. Brigham*, curator, is overruled.

A PPEAL from the Twelfth Judicial District Court, parish of Rapides.
Barbin, J.

Merrick, Race & Foster and *R. A. & Rob't P. Hunter* for Opponent
Mayfield, Appellant:

First—Prescription did not run against a resident within the Federal lines holding a claim against a resident within the Confederate lines, from April 19th, 1861, to April 2d, 1866. U. S. Revised Statutes, section 1048; 12th Wallace, 700; 6th Wallace, 539; 11th Wallace, 244, 493, 508; 15th Wallace, 177; 18th Wallace, 155; 22d Wallace, 576; 28th Louisiana Annual Reports, 840, case of *Aby & Catchings vs. J. Harvey Brigham*.

Second—*Rotchford Brown & Co.* being residents of the City of New Orleans, and *Mrs. Mary E. Winn*, testamentary executrix and universal legatee of *W. O. Winn*, being in the State of Texas, prescription did not run against the notes now owned by *Mayfield* until April 2d, 1866.

Third—*Contra non valentem agere prescriptio non currit.*

Fourth—A claim against a succession being once acknowledged by the representative of a succession, prescription is suspended as long as the succession remains open and in the process of administration. Succession of *Romero*, 29th Annual, page 493; *Henry Renshaw vs. Geo. W. Stafford*, Executor, 30 Annual, 853.

Fifth—An executrix cannot be heard to deny, fifteen years after it was made, her own official endorsement on the notes. Her oral testimony in the record should be excluded. Nor could any one else attack it except upon the allegations of error or fraud, which are not pleaded here.

Sixth—Witness contradicting his own act not credited; *Puckett vs. Law*, 25 An. 597; *Elbert vs. Wallace & Co.*, 26 An. 706; *Howell vs. Sheriff*, 27 An. 701; *Reynes vs. Zacharie's Succession*, 10 L. 129; *Mathews vs. Boland*, 5 R. 200; *McMasters vs. Stewart*, 11 An. 547.

R. J. Bowman for the Executor, Appellee.

Jas. Andrews, Jr., for Opponent *DuBois*, Appellant.

W. T. Blackman and *Breaux & Hall* for the universal legatee, Appellant:

First—The right of the several claimants to the succession of *Winn*, including *Mayfield*, to assert their claims according to law, if any such they have, and of the succession, and all parties in interest to contest the same, and each of them be reserved for future adjudication. Succession of *Winn*, 20 An. 794.

Succession of Winn.

Second—Placing Mayfield's claim on the tableau was therefore an error and a violation of this decision, and cannot, therefore, avail him.

Third—The notes of Mayfield and all notes of that series, were prescribed in December, 1865. The recognition of a debt of the succession, as of November 1st, 1865, is nevertheless proven not to have been made until after January 1st, 1866, when prescription had accrued; and when sued on, as in the Gasquet claim, prescription should have been pleaded.

Fourth—No executor or administrator has the right to renounce an acquired prescription, even by the most solemn written acts. 21 An. 373; 22 An. 465; 23 An. 194; 24 An. 33; 24 An. 380. Prescription was not suspended or interrupted by the war. *Jacquet vs. Webb*, Levert & Co. 22 An. 111; *Mearson vs. Robertson*, 19 An. 170.

Fifth—The plea of prescription, which should have been interposed in bar of a judgment in the Gasquet suit, may now be interposed by any party having an interest. *Succession Winn*, 30 An. 702.

Besides, the law will not permit the rights of heirs, legatees and third persons to be prejudiced by the inaction or improper conduct of executors.

Sixth—Prescription is not interrupted by filing an account, without authorization of the representative of the succession. *Succession Piper*, 26 An. 206.

Seventh—Acts of Congress, like acts of other States, are not binding upon the courts of this State in the administration of local laws; only when such laws are made in pursuance of the Constitution have they any binding force. *Story on the Cons.* § 1830; *Miltnerberger vs. Witherow*, 24 An. 184.

Eighth—An inspection of the authorities will show that the act of Congress referring to prescription has been enforced by the U. S. Supreme Court, only in cases tried in the Federal courts, without pretense that it would govern State tribunals where State statutes of limitation exist.

Ninth—Prescription of a judgment can only be interrupted by suit to revive. *Smith vs. Palfrey*, 28 An. 615; *Samory vs. Montgomery*, 27 An. 51.

The opinion of the Court was delivered by

Todd, J. On the 5th of July, 1880, J. M. Wells, Jr., executor of the succession of Walter O. Winn, filed in the District Court of the parish of Rapides a provisional account of his administration of said succession.

This account was opposed by J. D. Dubose, John S. Turner and Widow Gasquet, claiming to be judgment creditors of the succession, and by Mary E. Richards, wife of A. Keene Richards, formerly Mary E. Winn, surviving widow and universal legatee of the deceased.

The alleged judgment creditors opposed the account; first, because their judgments had not been recognized by the executor and placed on the account as first claims against the succession. In common with Mrs. Richards they opposed certain claims allowed in the account, the principal one of which was the claim in favor of John S. Mayfield, based on nine promissory notes, amounting, exclusive of interest, to \$45,000, and against which the prescription of five years was pleaded.

Mrs. Richards and Mayfield also pleaded the prescription of ten years against the judgments mentioned.

The District Judge amended the account by recognizing the judg-

Succession of Winn.

ments in favor of Dubose, Turner and Gasquet, and ordering them to be paid, and dismissed the opposition to Mayfield's claim, and homologated the account as amended.

From this judgment Mrs. Richards, Dubose and Mayfield are appellants.

I. The judgment in favor of Turner was signed on the 12th of March, 1866, and that in favor of Gasquet on the 7th of March, 1868, and neither was ever revived, and both were, therefore, clearly prescribed; and in allowing and recognizing them as subsisting claims against the successions the judgment was manifestly erroneous. C. C. 3521.

II. In relation to the claim of John S. Mayfield, the facts pertinent to the plea of prescription urged against it, which is the sole issue respecting it to be tried, are as follows:

On the 30th of March, 1860, Walter O. Winn executed, in favor of Ratchford, Brown & Co., ten promissory notes, secured by mortgage on a plantation in Carroll parish for \$5,000 each, one-half of said notes payable on the 10th of November, and the other half payable on the 10th of December of the same year, nine of which notes were transferred to Mayfield in the year 1866.

Winn died in 1862, leaving the notes unpaid, and by last will constituted his surviving widow, Mary E. Winn, (now Mrs. Richards), his universal legatee, and appointed her executrix of his estate.

On each of the nine notes held by Mayfield appears the following acknowledgment indorsed thereon, to wit:

"I hereby acknowledge this note to be a debt due by the succession of Walter O. Winn, deceased, secured by mortgage upon the property named in the act of mortgage, in Carroll parish, and I promise to pay the same in due course of administration.

"Alexandria, La., Nov. 1st, 1865.

(signed)

MARY E. WINN."

The opposition of Mrs. Richards (Winn) to these notes is couched in the following language:

"She opposes the ordinary claim of nine notes for \$5,000 each, amounting to \$45,000, which is allowed by the public administrator, (executor), and which he proposes to pay.

"Opponent says that the notes are prescribed, and were prescribed at the date they were accepted by the executrix, the date of the acceptance being written on the back of the notes long before they were accepted by the executrix, and accepted in error; the prescription of five years she specially pleads as a bar to said claim."

Mrs. Richards, who was sworn as a witness on the trial, fully sustains by her testimony the allegations of her opposition as to the time of

Succession of Winn.

the acknowledgment of the notes, and her error or ignorance with respect to the date expressed in the writing signed by her,—showing that the actual date of the signing was in January, 1866, instead of 1st November, 1865. And she is fully corroborated with respect to the real date of the signing by the testimony of Judge Ryan, also in the record.

The testimony of Mrs. Richards was, however, objected to by the counsel for Mayfield, and a bill of exceptions taken to its admission. The first objection is "that Mrs. Richards was estopped from denying her written acknowledgment or contradicting any part of the same." We have carefully examined the authorities cited by counsel to sustain their objection, but do not think them applicable.

The executrix of Winn's succession was wholly without authority to acknowledge a claim against the succession which was barred by prescription. If she did so, and the written acceptance showed that it was allowed after prescription had run, it would palpably be without effect as to the rights of other creditors; heirs or legatees of the succession. If, however, though the acknowledgment was made after prescription, yet the writing showed a date of acceptance before prescription had accrued, and was, therefore, false and the signature of the executrix to such false writing had been induced by error, and such error expressly alleged, it would certainly be competent for the executrix to expose the falsity of the writing and correct the error, and it would be her duty to do so; and the right of any other party interested to do the same and, by such exposure, protect themselves from loss, would seem plainer still.

In this case, the proof is offered by Mrs. Richards as universal legatee, in which capacity alone, her opposition is made. The preparation of a written acknowledgment of the notes in question, and the insertion therein of a false date, and the presentation of the same to the executrix with this false date, without calling her attention to it, was a fraud upon the succession and its representative and subject to be exposed by any one interested.

The next objection urged to the testimony, was that the claim of Mayfield had been twice contested on the ground of prescription, and it had been decided that it was not prescribed and, therefore, the matter was *res adjudicata* and closed to further inquiry. This question is not free from difficulty; but from a careful study of the cases in which it is contended the decisions were made, we have reached the conclusion that they do not sustain the plea.

The first case cited in support of the plea, is that of the succession of W. O. Winn: On petition of J. S. Mayfield to destitute Mary E. Richards, executrix, reported in 27 An. 687. In this proceeding, Mayfield charged that Mrs. Richards had forfeited the executorship of the succession by quitting the State, becoming a non-resident of the same,

and leaving no agent to represent her under a power of attorney duly recorded. Mrs. Richards denied the right of Mayfield to institute such proceeding, on the ground that he was not a creditor of the succession, and averred that, if his claim ever existed, it was prescribed. There was judgment rendered destituting her of the executorship.

The object of that suit was solely the destitution of the executrix. There was no judgment sought or asked for on the notes; but the question whether Mayfield was a creditor or not was a mere incident of the proceeding, raised with reference to the right of the plaintiff therein, as an interested party, to demand the removal of the executrix or rather to have declared her forfeiture of the executorship by reason of removal from the State. So far as related to the existence of the claim in question or its extinguishment by prescription or otherwise, neither the succession nor its creditors were properly represented, and any ruling on the point could in no manner affect them.

This is the view taken of this identical question by our immediate predecessors in the other case cited and relied on by the counsel for Mayfield. We refer to the case entitled Succession of Walter O. Winn, reported in 30 An. 702.

In that case, a rule had been taken by persons claiming to be creditors of the succession to cause the property thereof to be sold to pay their debts. This was opposed by Mayfield. These creditors then denied his right to oppose them and pleaded prescription against his claim. Mayfield resisted the plea on the ground that the question was *res adjudicata*, and cited in support of it the decision in 27 An., to which we have referred.

The Court in ruling on the question said:

"It is also denied that Mayfield is a creditor, and averred, if he ever was, his debt is prescribed. He claims that the question of prescription was judicially determined in his favor in a suit brought by him to remove Mrs. Winn from the administration of the estate; and that his debt which is evidenced by several promissory notes, has been legally acknowledged both by the former and the present executor. The evidence supports the latter allegation; but we do not consider the adjudication in the motion suit as determining finally, for other purposes and against other creditors or parties interested, the matter of prescription." The Court dismissed the entire proceedings, and in their decree used this language: "That the right of the several claimants, including Mayfield, to assert their claims according to law, if any such they have, and of the succession and all parties interested to contest the same, be reserved for a future adjudication."

This disposes of the plea of *res adjudicata*, and with it of the objections to the admission of Mrs. Richards' testimony. This testimony,

supported as it is by Judge Ryan, as before stated, leaves no doubt that the acknowledgment of the claim by the executrix was made after the expiration of five years, the prescriptive term, from the maturity of the notes.

We would remark, also, that the plea of prescription was urged in these opposition proceedings against the claim of Mayfield, not only by Mrs. Richards, but by those claiming to be judgment creditors of the succession.

III. The counsel for Mayfield and the executor, however, urge, with great earnestness that, even admitting that the acknowledgment of the notes was not made within the five years, prescription on the notes was suspended by and during the war, and also by the effect and under the operation of the Act of Congress embraced in section 1048, United States Revised Statutes.

Upon the first ground of suspension urged, whatever opinion we might entertain respecting it were the question a new one, we must consider it put at rest by repeated and uniform decisions of this Court running through many years. These decisions declare, in unmistakable terms, that the war between the States did not operate a suspension of prescription. Upon the principle of *stare decisis* we do not feel authorized to disturb them. 19 An. 187; 20 An. 280, 363, 413, 427; 21 An. 76, 106, 126; 22 An. 111; 23 An. 553, 748.

The Act of Congress, relied on as operating a suspension of prescription in this case, reads as follows:

"In all cases where, during the late rebellion, any person could not, by reason of resistance to the execution of the laws of the United States, or of the interruption of the ordinary course of judicial proceedings, be served with process for the commencement of any action, civil or criminal, which had accrued against him, the time during which such person was beyond the reach of legal process shall not be taken as any part of the time limited by law for the commencement of such action."

The most natural inference to be drawn from the reading of this statute is, that it is applicable alone to actions and proceedings in the Federal courts and intended to establish a rule of practice therein on the subject mentioned. We cannot readily conceive that it was designed as a law to govern the States and State courts, and that, in fact, it was virtually to constitute an amendment to our Code, making an addition to the causes of the suspension of prescription therein enumerated. We supposed, if there was any one subject exclusively within the control of the State governments, it was that which related to the organization of State courts, defining the different kinds of actions, prescribing the time within which they must be instituted, and, in fine, establishing a system of practice for the regulation and government of such courts.

This was a power inherent in all sovereignties and which the States had exercised to the fullest extent before they became members of the Federal Union, and which it was not supposed they had parted with or impaired by any delegation of the power, express or implied, to the Federal government. Indeed, it would be difficult to the mind, uninformed on this point, to imagine under what particular clause of the Federal Constitution the Congress of the United States could claim the right to regulate the prescription of actions in the States; that is, to determine within what time actions were to be brought and to declare that any particular cause, condition or circumstance could modify such rule of practice or suspend its operation. The statute in question, if applicable to State courts, is just one of this kind, and necessarily involves such an assumption of power. Opposed to such authority, in our opinion, are the plain terms of the Constitution itself, and the as plain teachings of the framers of that instrument, and of the writers on the subject of its construction and the relative powers of the States and the Federal government under it. And equally opposed to it we believe to be the jurisprudence—Federal and State—established by an unbroken series of decisions on subjects strictly analogous to the one involved.

State courts, acting on matters within their jurisdiction, under State laws regulating their practice in them and the right and form of actions to be prosecuted before them, and in no manner impinging on the inhibitions of the Federal Constitution, are just as independent and free from Federal control and interference as the courts of a distinct sovereignty or of another country. And, notwithstanding our profound respect for that august tribunal, we cannot yield our firm and conscientious convictions on this subject to an isolated decision of the Supreme Court of the United States, (*Stewart vs. Kohn*, 11 Wall. 493), which held that this Federal statute was applicable to proceedings in State courts; nor are our convictions changed by the legal subtlety displayed in that decision, which locates the constitutional authority of Congress thus to legislate for the government of the State courts, and to fix the prescription of actions therein in or under the war making power. We say isolated decision, for the reason that it is the only one we find in which the decision was rendered on appeal from a State court, and where it is distinctly announced that the statute in question applied to and controlled proceedings in State courts—every other case in which the effect of that statute was at issue having been instituted in the Federal courts, and such effect not having been expressly extended to the State courts.

Nor are we any more impressed with the authority of a decision of the Supreme Court of this State, 28 An. 840, *Aby vs. Brigham*, curator, invoked, which contains a mere dictum on the point without comment or

Succession of Winn.

reason, and shows nothing on the face of it but an acquiescence in an authority which, if universally conceded and exercised in *pari materia*, can successfully invade every subject heretofore acknowledged to pertain to the domestic affairs and institutions of a State, and supplant the rights of action, the mode of procedure or practice in the State courts, by other systems, modes and methods, framed and supplied by Congressional legislation. The case last referred to, to the extent of the authority of this Court, may be considered overruled.

Under this view of the subject, we conclude that the claim of Mayfield was prescribed when acknowledged by the executrix, and that the acknowledgment made after prescription had run, was without legal effect against the succession or any person interested therein.

This disposes also of the questions raised by the opposition of Mayfield, who, being without interest, has no right to oppose the claims of others, or raise issues touching any of the proceedings.

IV. The claims of Mayfield, as also of Turner and Gasquet, being disposed of, the only parties left before the court are the executor and the opponents, Mrs. Richards and Dubose.

We do not understand that the judgment of Dubose is opposed by Mrs. Richards, inasmuch as no objection thereto is urged by her counsel in their brief. But, however, even if we consider her opposition as extended to this claim, it is without effect, since it is limited to the plea of prescription against the judgment; and we find that ten years have not yet elapsed since its rendition.

V. The only other items of the account opposed are four, consisting of the charges for attorney's fee of R. J. Bowman (item 30), \$919; taxes, \$266.62; (item 4), and costs of certain suits.

The evidence sustains the charge for attorney's fees, and the ground of opposition to the costs is not on account of their incorrectness but of their not enuring to the benefit of the estate, which allegation is unsustained by proof and is, therefore, overruled. The item for taxes is supported neither by a voucher nor by proof, and must be rejected.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court be amended by rejecting the claims of Jno. S. Mayfield, John S. Turner, Widow Gasquet, and the item of \$266.66 for taxes, as proper charges against the succession of W. O. Winn, deceased, and sustaining the oppositions of Mrs. Mary E. Richards and J. D. Dubose thereto, and, as thus amended, it be affirmed the costs of the oppositions of Mayfield, Turner and Gasquet in both courts, to be paid by these opponents respectively, and the balance of the costs by the succession of W. O. Winn.

 Fisk vs. Soniat et al.

ON APPLICATION FOR REHEARING.

LEVY, J. In our original judgment we rejected the claim for \$266 26 (item 4) for taxes, on the ground that it was "neither supported by a voucher nor by proof." On his motion and brief for a rehearing, the executor urges that the vouchers, as to this item, were filed in the lower court and that evidence was taken in reference thereto—not this evidence but the voucher itself, is contained in the record; that the plea of prescription was made against the item, which is a virtual admission that the debt once existed.

Counsel for the opponent, Dubose, in an addendum to the brief in behalf of executor, admits that item 4 for said taxes "was supported on the trial in the District Court by the receipt of the tax collector of Caddo for that amount of taxes paid by the executor on the land in that parish, sold in 1878." There was no contest in the lower court as to the verity of the payment, but simply upon the question whether the taxes were prescribed when paid by the executor.

An examination of the record on this point satisfies us that prescription had not accrued at the date of said payment. Our original decree must, therefore, in respect to that item, be amended.

We find no reasons advanced to justify any change in our opinion and decree on the other points and matters decided by us.

It is, therefore, ordered that our original decree herein be amended so far as it rejects the item of \$266 62 for taxes paid by the executor, which item is now recognized as a just claim against the succession, and in all other respects our former opinion and decree are to remain undisturbed.

 No. 7271.

JOSIAH FISK VS. L. SONIAT ET AL.

Charges of dishonesty against the Parish Attorney made in good faith and in the discharge of their official duties by members of the Police Jury, do not render them liable in damages for libel.

A PPEAL from the Second Judicial District Court, parish of Jefferson.
Pardee, J.

Chs. Louque for Plaintiff and Appellant:

First—A general denial does not admit that defendant was guilty of a libel. 28 An.238.

Second—On proof of the libel, damages should follow. 27 An. 219; 19 An. 194.

Spencer & White and *H. Chiapella* for Defendants and Appellees:

First—The matters charged as libellous were said, published and done by the defendants in the discharge of their official duties. They were privileged. *Townsend on Libel and Slander*, p. 414, sec. 233, p. 420; *Harrison vs. Bush*, 5 El. and Bl. 344; *Whitely vs. Adams*,

Fisk vs. Soniat et al.

15 C. B. N. S. 292; Cook vs. Hill, 3 San. (N. Y.) 341; Van Wycke vs. Gurthrie, 4 Duer (N. Y.) 268; Hale vs. Parsons, 23 Tex., 9; Larkin vs. Noonan, 19 Wis. 82.

Second—The communication to the Governor, who was vested with the power to remove, and whose action was beyond the pale of judicial inquiry, was absolutely privileged; hence not actionable. Larkin vs. Noonan, 19 Wis. 82; State ex. rel. Martin vs. Lamantia, 33 An. 1149.

Third—If not absolutely, the communication was conditionally privileged; hence, threw on plaintiff the burden of showing express malice and want of probable cause. Townsend, p. 348, and authorities already quoted.

Fourth—There was no malice, and there was probable cause.

Fifth—The evidence of justification is in the record, and was admitted without objection; it can be considered, and is not governed by Harrison vs. Jurgielewicz, 28 An. 238.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an action for damages claimed to have been sustained by the plaintiff, in consequence of alleged tortious acts. The damages are assessed at \$14,500, and the defendants are asked to be condemned to pay *in solido*.

The tortious acts charged are: That the defendants, who were members of the Police Jury of Jefferson parish, have maliciously caused to be entered on their minutes, resolutions to the effect that the plaintiff had swindled the parish out of some tax collections.

From the evidence and the statement of facts, we gather that the plaintiff was the parish attorney *pro tem.*; that, in tax cases in which twenty-five per cent. in cash had been collected, he paid ten per cent. only into the parochial treasury; that the Police Jury, at a regular meeting, appointed a committee to inquire into the facts; that the committee reported that, in a case the tax collected by the attorney was, or should have been, twenty-five per cent. in cash and the remainder in warrants; that the report of the attorney shows but ten per cent. in cash were accounted for, while the parties averred that they paid at the rate of twenty-five per cent. in cash.

On this report, a resolution was adopted raising a committee to wait on the Governor and request the revocation of the attorney. The committee presented a petition to that end, on the grounds that the attorney was ineligible under article 105 of the Constitution; that twenty-five per cent. had been collected on certain taxes and only ten per cent. had been paid in by him; that judgments for large amounts had been rendered against the parish during the incumbency of the attorney, of which he claimed to be the owner of a considerable sum, and that the Police Jury had lost confidence in his ability to faithfully represent the parish.

The Governor then empowered a practicing attorney of recognized ability and independence to investigate the charges. This gentleman, after doing so, reported that he thought the charges were substantiated and that the attorney should be removed.

Acting on the matters before him and in the exercise of a discretion vested in him, the Governor made the removal.

Charging malice, want of probable cause and the falsity of the charges, the plaintiff brought this suit.

This is clearly an action to saddle responsibility on the defendants for acts done by them in the discharge of their official duties.

Entrusted with the administration of parochial affairs, it was their duty to see that the revenues of the parish were faithfully collected and accounted for, and, to that end, to take all proper and necessary steps. Had they proved derelict in such duty they would have exposed themselves to liability.

They had a right to appoint the committee, to hear and receive their report, to act upon the same and to apply as they did to competent authority for the displacement of an officer whom they thought was delinquent and no longer trustworthy.

For the honest and *bona fide* discharge of such duties, they are shielded from responsibility, as they acted in an official capacity, regularly, and under what seems to be due sense of their functions.

It does not appear that the attorney received twenty-five per cent. and accounted for ten per cent. only in tax matters. The evidence rather tends to show that the justice collected the first and that he received the last percentage, and that he paid what had come to his hands. Be that as it may, he was not charged with having collected twenty-five and paid ten per cent. The alternative charge was that the tax collected by the attorney was or should have been twenty-five per cent. in cash and the remainder in warrants. If twenty-five per cent were collected, and he knew it, the attorney should have forced the justice of the peace who made the collections to account accordingly.

Even if they erred in their conclusion in withdrawing their confidence, the Police Jury did so honestly and had a legal right to act officially as they have done.

The plaintiff has alleged, but has not proved any malice, express or implied, on the part of either of the defendants. They were clothed with a quasi judicial authority. They had probable cause and acted *bona fide* in matters pertaining to their functions and which required their action. Under English and American authorities and common sense, they are privileged, and are fully protected and exonerated. Townsend on L. and S., 348, 414, 420; 19 Wis. 82; 33 An. 1149; Cooley on Torts., pp. 403 et seq.; Jacob's Dig., vol. 3, p. 402; 3 same, N. Y. 341; 4 Duer N. Y. 268; 17 N. Y. 190; 23 Tex. 9.

The District Judge properly rejected the claim.

It is, therefore, ordered that the judgment appealed from be affirmed with costs.

No. 8322.

THE STATE OF LOUISIANA VS. JOHN WITTINGTON.

It affords no ground of challenge to the array, that the names of deceased and incompetent persons were placed in the box, or drawn therefrom. The accused can only take advantage of it by a challenge to the poll. The incompetency of one of the Grand Jurors cannot be urged by the accused after he has pleaded to the indictment and been convicted, in the absence of averment and proof that he, (the accused), only knew of the incompetency after trial and conviction.

A PPEAL from the Twenty-second Judicial District Court, parish of St. James. *Cheevers, J.*

F. B. Earhart, District Attorney, for the State, Appellee.

J. L. Gaudet for Defendant and Appellant:

The names of incompetent persons, especially those charged with crime punishable in the Penitentiary, should not remain in the box from which the jury is drawn. 20 A. 356, 46 442, Act No. 44, Regular Session of 1877; Act No. 54, 1880.

A person charged with larceny cannot act as a grand juror, and a subsequent trial and acquittal of such person will not establish his status. 21 A. 251; 30 A. 884.

The opinion of the Court was delivered by

TODD, J. The defendant was indicted for the crime of rape, and convicted of an assault with intent to commit a rape; was sentenced to six months imprisonment at hard labor in the Penitentiary, and has appealed from this sentence.

He relies on two errors suggested in the proceedings below for relief: The first is the overruling by the judge *a quo* of his challenge to the array; and second, the denial of his motion in arrest of judgment.

The challenge to the array was based upon the allegation that the jury commissioners had drawn the several names of persons then deceased, and also the name of a party then under a charge of arson; it was also urged that there were certain irregularities touching the custody of the venire list and box, and want of completeness in the process verbal of the commissioners, which last seems to be abandoned in the argument.

It affords no ground of challenge to the array that the names of deceased and incompetent persons are placed in the box or drawn therefrom. This fact could not vitiate the entire drawing. It could only be taken advantage of by a challenge to the poll, as relates the incompetent jurors. This has been repeatedly ruled, and is the accepted doctrine, and accords with the express language of the statute. Sec. 10, Act 44 of 1877; 31 An. 94; 26 An. 581.

In regard to the motion in arrest of judgment, it contains no other ground than an averment, that one of the grand jurors who found the

Mellor vs. Gilmore, Executor.

bill, under which the accused was convicted, was incompetent to serve, for the reason that there was a charge of larceny pending against him at the time of his selection. This was more properly a ground for a new trial, since it did not involve an irregularity patent on the face of the record. Though waiving this, it is the settled doctrine that such irregularity cannot be urged after the accused has formally pleaded to the indictment and been tried under it, in the absence of any averment or proof that the fact relied on was not ascertained until after these proceedings.

On this point we quote the following from Bishop: "Thus after a party has pleaded to an indictment and been convicted, it is too late to object to the constitution of the grand jury, or to the disqualification of any particular member, more especially if it was known before." 14 An. 827; 28 Miss., 687; 2 Barb., 427; 2 Parker, C. C. 235; 7 Eng. 630.

The case of *State vs. Parks*, 21 A. 251, cited in opposition to this view, is not in point, as in that case it distinctly appeared that the incompetency of the grand juror was only discovered after the trial, and the irregularity was taken "advantage of by a motion for a new trial," and not by motion in arrest. In the present case there is no averment or pretense that the fact of incompetency was not known to the accused before arraignment and trial.

Judgment appealed from affirmed.

No. 8018.

MRS. HARRIET R. MELLOR vs. T. GILMORE, EXECUTOR.

The Court below having sustained the Exception to its jurisdiction and refused to hear and determine the differences between the parties, this Court can only pass upon the said Exception and cannot, in this Appeal, decide the other issues of the case.

The character of a suit is to be ascertained by the prayer rather than by the allegations of the Petition.

This action is not one of partition, but one for a money judgment against a succession, and the Court below, as a court of probates, had jurisdiction. The case must, therefore, be remanded.

A PPEAL from the Second District Court for the parish of Orleans.
Tissot, J.

Nicholls & Carroll for Plaintiff and Appellant:

The question before the Court is simply one of jurisdiction. The action of plaintiff is not for a partition, but for a sum of money due by a succession.

Such an action must be brought in a court of probate jurisdiction. The Second District Court for the Parish of Orleans—a Court solely of probate jurisdiction—had jurisdiction in the premises.

Mellor vs. Gilmore, Executor.

T. Gilmore & Sons for Defendant and Appellee:

First—This is in effect an action of partition of which the late Second District Court for the Parish of Orleans, had no jurisdiction. *Boutté vs. Boutté*, 30 An. 177; *Buddecke vs. Buddecke*, 31 An. 572; *Freret vs. Freret*, 31 An. 506; *Benedict vs. Florat*, 30 An. 1337; *Louque's Digest*, p. 160.

Second—The allegations of the petition and the proof show that plaintiff has no cause of action—she having previously sold and conveyed all her rights in the succession of her daughter, Mrs. Stanley, to her co-proprietor. Petition, page 5; Act of partition, p. 179; Civil Code, Arts. 1380, 1372, 1412, 2650, 2651; 20 An. 353; 15 An. 585; 6 R., 488.

Third—The heir is a necessary party to an action for partition. The executor cannot represent the heir; and the executor was *functus officii*. *Boutté vs. Boutté* 30 An. 182, and authorities there cited.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The plaintiff brings this action as the universal legatee of her daughter, to recover \$8246, as the alleged value of money, effects and property belonging to the community between her and her deceased husband, Stanley, which were not included in the act of partition between the plaintiff and the latter's executor and which she did not then know to exist.

The executor pleaded: want of jurisdiction in the court, want of proper parties and no cause of action.

The lower court sustained the first plea and dismissed the suit. The plaintiff appeals.

Considering that it had no jurisdiction over the case, the lower court properly abstained from passing upon the questions presented by the second and third exceptions. It could not logically do otherwise, as the determination of those pleas implied jurisdiction and would have had the court to occupy antipodal and self-destructive positions. All we can do now is to examine whether the District Court erred or not in refusing to hear and determine the differences of the litigants.

It is claimed that this Court has several times decided causes or points different from that on which the lower court acted. This is true, but there had been a hearing, an examination of the controversy, which had been gone into and passed upon, so as to settle the differences. The point determined to justify the judgment was immaterial to this Court. A court having jurisdiction can hear and determine, but it may hear without determining, and it may determine without hearing, all the points raised. 6 Pet. 691; 12 Pet. 657, 717; 10 Cal. 292; 43 Tex. 440; 44 Cal. 84. It may decide a case on a single point whether made or not. In the cases referred to, it will be perceived that a judgment had been rendered susceptible of acquiring the force of *res judicata*. That was sufficient to authorize the appellate court to adjudicate upon the issues presented, whether of fact or of law, or both. Such adjudication could also be

Mellor vs. Gilmore, Executor.

made, in such cases, even if only a *nonsuit* had been rendered. This Court revises the judgments and not necessarily the reasons of lower courts on appeal.

Pleas to the jurisdiction, however, are different. When sustained they withdraw the whole case from the court.

In the exercise of its appellate powers, this Court reviews the judgments of lower courts, to affirm, reverse or amend them, or to remand a case.

We cannot, in the present phase of this action, decide what the rights of the parties are, for that would be assuming and exercising an original jurisdiction, which we do not possess in that class of cases.

This Court can exercise its appellate jurisdiction only in so far as it shall have knowledge of the matters argued or contested below. C. P. 895; 3 N. S. 52; 5 R. 82; 1 L. 323; 3 L. 516; 6 L. 402; 24 An. 223.

We do not think that the lower court properly declined jurisdiction.

The character of the suit is not to be ascertained and determined so much by the allegations of the petition as by the prayer for relief.

In the present action, the plaintiff seeks a *money* judgment for the causes enumerated in the petition. What the grounds for recovery are, is insignificant. They may not justify the prayer; they may be destructive of it; they may be such as would require a rejection of the demand on the face of the petition; but, from this the only inference that could be drawn would be that the court should, in the exercise of its powers, quiet the defendant. It is only after the court shall have taken jurisdiction that the other defenses can be adjudicated upon.

The suit being one for *money* against a succession, not only was properly brought before the Second District Court for the parish of Orleans, which had *exclusive* jurisdiction, but could not be instituted before any other court. 33 An. 692.

The record does not show that the heirs had been put and were in actual possession at the bringing of this suit. The order of the 31st of December, 1879, directing such possession, was in suspense on the 9th of January following, when the petition herein was filed. An order had even been made three days after, on the 12th, directing the executor to make provision for the demand of the plaintiff as it had then been presented and existed on the docket of the court.

It is, therefore, ordered and decreed that the judgment appealed from be reversed; and, accordingly, that the exception to the jurisdiction be overruled; that the case be referred to the Civil District Court for the parish of Orleans, which has superseded the Second District Court for that parish, there to be further proceeded with according to law; defendant and appellee to pay costs of the lower court from the filing of the exception to the jurisdiction, and the costs of appeal.

State vs. Wells.

No. 8345.

THE STATE OF LOUISIANA VS. ALONZO WELLS.

A venire drawn by a majority of the Jury Commission, in the absence of a member who has not yet qualified, is legal and regular.

A PPEAL from the Seventeenth Judicial District Court, parish of East Baton Rouge. *Sherburne, J.*

J. C. Egan, Attorney General, for the State, Appellee :

First—The non-qualification of one of the appointees on a jury commission does not invalidate the organization of said commission, nor the proceedings thereof, if said appointee does not participate therein.

Second—It is only necessary that three members of a jury commission be present and transact the duties imposed on the commission. Sec. 3, Act No. 44, of 1877.

Third—It is a presumption of law that public officers perform the duties, and it is incumbent on the complainant to prove dereliction.

Cross & Jones for Defendant and Appellant :

The process verbal of jury commission must show that the formalities of law required in drawing the jury are complied with.

The commission must be organized as a whole before a majority can form the venire.

The verdict of the jury must appear on the indictment in proper form—and where there is no verdict endorsed in proper form the informality is not helped by the statement of the minutes.

The accused is entitled to the charge that the name of the deceased as stated in the indictment should be proved.

Where the record does not show that the indictment was brought into open court by the grand jury, the defect is fatal.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The accused was prosecuted for murder, found guilty without capital punishment, and sentenced to hard labor for life in the State Penitentiary.

On appeal, he seeks to have the verdict and judgment thereon set aside on the ground that the motion which he made to quash the venire was illegally overruled. The motion charges that the jury commission was not organized by the acceptance of one Von Phul, and the majority could not act until the commission was thus completed.

It is sufficient to say that the law does not contemplate as a condition precedent, *sine qua non*, that the members of a jury commission should all accept and qualify, before a majority of them, who have accepted and qualified, can act in the discharge of duties which the statute expressly imposes upon them. It is only necessary that the three members who compose such majority of the commission have accepted, qualified, be present and fulfill the functions assigned to them. The omission of one of the members of that body to qualify or to participate in

State vs. Green.

the discharge of such duties, does not strike fatally the existence, or invalidate the official acts, of that body. Act 1877, No. 44, Sec. 3.

The speedy and impartial administration of justice, to which both the State and the accused awaiting trial are entitled, cannot be permitted to be impeded and thwarted by the happening of such irregularities. It was, no doubt, in prevision of the occurrence of such contingencies, that the law has wisely lodged in a majority the whole powers of the entire organization.

Judgment affirmed.

No. 8341.

THE STATE OF LOUISIANA VS. NARCISSE GREEN ET AL.

In a criminal prosecution where two defendants are jointly on trial, the State is entitled to six peremptory challenges for each twelve challenges to which such defendants may be entitled. Act No. 24 of 1878 is not unconstitutional and governs this point.

The presence of the accused in court is not necessary during the filing, trial and disposition of a motion for a new trial. Previous Decisions affirmed.

A PPEAL from the Twenty-fifth Judicial District Court, parish of Lafayette. *Clegg, J.*

J. C. Egan, Attorney General, for the State, Appellee:

First—Act No. 36 of 1880, is the law which governs the challenges of jurors in trials of criminal cases at regular jury terms, where the punishment may be death or imprisonment at hard labor for a term of twelve months or more.

Second—Secs. 997 and 998 R. S. are repealed by Act No. 36 of 1880; and Sec. 4 of Act No. 24 of the E. S. of 1878, p. 283.

Third—That the presence of accused in court on the trial of the motion for a new trial is not essential. 32 An., 560, and authorities there cited, etc.

O. C. Mouton and *C. DeBaillon* for Defendant and Appellant:

First—State is only entitled to six peremptory challenges regardless of the number of defendants in the prosecution. Sec. 998, R. S. 1870; 24 An. 38; 25 An. 472.

Second—Provision in Act No. 36 of 1880 which allows more than six peremptory challenges to the State is unconstitutional, null and void, contravening articles 29 and 30 of the Constitution of 1879.

Third—That said Act No. 36 amends section 997 and not section 998 Revised Statutes of 1870.

Fourth—That the title of said Act embraces no amendment or repeal of said section 998.

Fifth—Record must show presence of accused in court, when motion for new trial is filed, tried, evidence in support thereof introduced, and when submitted and overruled.

The opinion of the Court was delivered by

LEVY, J. Narcisse Green and Arthur Meaux were jointly indicted for the crime of larceny, tried and convicted, Green being sentenced to hard labor in the Penitentiary for the term of eighteen months and Meaux for two years. Green has alone appealed.

The principal ground on which he relies for a reversal of the judgment is, that the judge *a quo* allowed the State to exercise more than six peremptory challenges. He contends that the provision in Act No. 36 of 1880, which allowed more than six peremptory challenges to the State, i. e., six for each defendant when more than one is on trial, is unconstitutional and void and contravenes Arts. 29 and 30 of the Constitution of 1879, which articles are as follows: "Art. 29. Every law enacted by the General Assembly shall embrace but one object, and that shall be expressed in the title." Art. 30. "No law shall be revived or amended by reference to its title, but in such cases the act revived or section as amended shall be re-enacted and published at length." He also contends that Act No. 36 of 1880 amends section 997 and not section 998 of the Revised Statutes of 1870; also, that the title of said act embraces no amendment or repeal of said section 998.

It is unnecessary to consider the arguments advanced both by counsel for the defence and the prosecution as to the effect of Act No. 36 of 1880, because the question is disposed of by Act No. 29 of 1878.

This last act was passed while the Constitution of 1868 was in force, and in that Constitution there was no inhibition against the Legislature incorporating more than one object in one bill. Art. 114 only requires that "Every law shall express its *object or objects* in its title." Act No. 24 of 1878, among other articles embraced in its title, contains the following: "And to provide that in all criminal trials, where two or more defendants are jointly on trial, each defendant shall be entitled to twelve peremptory challenges, and that the State shall be entitled to six peremptory challenges for each twelve challenges to which such defendants may be entitled under this act, and to repeal all laws in conflict herewith."

Section 4 of that act enacts: "That in all criminal trials, where two or more defendants are jointly on trial, each defendant shall be entitled to twelve peremptory challenges, and that the State shall be entitled to six peremptory challenges for each twelve challenges to which such defendants may be entitled under this section." And Sec. 5, "That all laws and part of laws in conflict herewith, be and the same are hereby repealed, and this Act shall take effect from and after its passage."

This then repealed sections 997 and 998 of the Revised Statutes of 1870, which were clearly and expressly in conflict therewith.

The presence of the accused is not necessary in court during the filing, trial and disposition of a motion for a new trial. 32 An. 560 and authorities there cited.

The judgment appealed from is affirmed at appellant's costs.

State vs. Shields.

No. 8344.

THE STATE OF LOUISIANA VS. JAKE SHIELDS.

The law provides no delay for arraignment after indictment or information, and the accused is required to plead when arraigned, which is his only time as of right.

The excusing of a juror by the Court, even if the latter committed an error in so doing, cannot be taken advantage of by the accused.

A PPEAL from the Seventeenth Judicial District Court, parish of East Baton Rouge. *Sherburne, J.*

J. C. Egan, Attorney General, for the State, Appellee:

First—When an accused refuses to plead to an indictment, the order of the court to enter a plea of “not guilty” is right and proper.

Second—The objection of accused that he has not had sufficient time to prepare his plea is worthless when he has already been tried for the same offense, and is about to undergo a new trial.

Third—This Court is without authority to disturb the sentence of the court *a quo* because of the penalty when the penalty therein imposed in conformity with the statute.

Fourth—Dying declarations are admissible in evidence.

Fifth—This Court will not remand a case because of the refusal of the judge *a quo* to charge the jury as requested by the accused, when the record fails to disclose the possible basis of said request, or that some injury resulted to the accused by said refusal.

Sixth—It is in the discretion of the judge *a quo* to excuse from jury duty any juror who presents an excuse. Bishop on Crim. Pro., vol. 1, Sec. 926, and authorities there cited. 18 Iowa, 435.

Cross & Jones for Defendant and Appellant:

Accused should have a reasonable time to plead. Archbold Criminal Pleading, pp. 63, 73, 74. An exempt fireman in Baton Rouge is not excused from jury duty.

A dying declaration is admissible only under the same conditions as if the deceased were on the stand; “anything the murdered man in *articulo mortis* may say to facts is receivable, but not what he says as matter of opinion.” Wharton's Criminal Law, Old Ed., p. 182.

Accused is entitled to the charge that the name of deceased should be proved as alleged. Greenleaf, 3d. vol., 2d paragraph; and the judge erred in withholding such charge on assuming as a fact, that the name was actually proved as laid.

The opinion of the Court was delivered by

FENNER, J. The errors urged in this Court are the following:

1. Exception is taken to the ruling of the court in requiring him to plead at the time of his arraignment and, on his refusal, in ordering the plea of not guilty to be entered in his behalf—the complaint being that he was arraigned on the same day on which the information was filed, and had not had time to determine on his plea. The law provides no delay for arraignment after indictment or information, and the defendant is required to plead when arraigned, which is his only time as of right. 1 Bishop Crim. Proc., § 734.

State ex rel. Williams vs. Pertsdorf, Constable.

Indulgence is often granted in the discretion and leniency of the court, but there is no law controlling such discretion. In the present case, the judge states in his reasons for refusing time, that the prisoner had been previously tried and convicted for the same offense, and had remained in custody under an order of this Court remanding the case, and should have been ready to plead to the new proceeding. No suggestion is made of any special injury suffered by the prisoner from the ruling, and we see no ground for our interference.

2. Exception is taken to the action of the court in excusing a jurymen, for a cause which the defendant contends was not sufficient under the law. Admitting the cause was not sufficient, the judge exercised his discretion in determining the question, and his error in such matter would afford no ground for relief. 1 Bishop Crim. Proc., § 926; State vs. Ostrander, 18 Iowa, 435.

3. The exception to the admissibility of the dying declaration of the deceased, on the ground that it consisted of the simple statement "Jake Shields shot me," without giving the facts on which the statement was based, is frivolous.

4. In regard to the exception to the refusal of the judge to charge that "the indictment giving the name of the deceased as Peter Flores, if the State only proved the death of one Flores, the variance is fatal." We think that the charge was substantially covered by the court's instruction that the "jury had to be satisfied of the identity of the deceased." The judge states that he saw no reason for giving the charge as requested, because the District Attorney in examining the witnesses began by stating: "This is the case of the State of Louisiana against Jake Shields, charged with the murder of Peter Flores—tell the jury all you know about it." The record failing to show any ground on which the request for the particular charge was based, no objection to any particular evidence appearing, and no suggestion of any special injury to the accused being made, and there being no variance between the verdict and the indictment, we see no reason for disturbing the verdict on this ground.

Judgment affirmed.

No. 8414.

THE STATE OF LOUISIANA EX REL. HENRY WILLIAMS VS. JOHN PERTSDORF,
CONSTABLE OF THE SEVENTH JUSTICE OF THE PEACE FOR THE PARISH OF
ORLEANS.

A prisoner arrested by virtue of the *mittimus* of a committing magistrate, cannot, in an application for a *habeas corpus*, raise the question of the legality of said magistrate's title to office, when the latter is the regular incumbent *de facto*, acting and presiding over a tribunal of recognized legal existence and competency.

APPLICATION for writ of *Habeas Corpus*.

R. G. Harris for the Relator.

A. E. Billings for the Respondent.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an application for a *habeas corpus*.

The relator charges that he was illegally arrested, confined, and is held for an offense within the appellate jurisdiction of this Court, and that he is entitled to be restored to liberty. The illegality propounded consists in this: that the *mittimus* is signed by one I. W. Falls, who has ceased to be a committing magistrate, and who was replaced by one A. P. Keller, under executive appointment, the term of office for which Falls had been elected, commissioned and qualified having expired, and Keller having been commissioned and qualified and being in the discharge of his functions. The return of the constable is, substantially, that the *mittimus* is in due form and signed by one in authority.

From the showing made, it appears that Falls was elected and commissioned in December, 1878, to serve under the law, for the term of two years, or until his successor be duly commissioned and qualified; that there was no election at the expiration of the term for which he was elected and at the time when one should have been held; that the Executive has, in November, 1881, appointed and commissioned A. P. Keller his successor, his term of office having expired; that Keller upon being commissioned and qualified, entered upon the duties of a committing magistrate and acts in that capacity; that Falls has continued to act as committing magistrate, and that both Falls and Keller are each recognized, to some extent, by the authorities.

It is, therefore, manifest, that a question of title to the office is raised by the issues. It cannot be agitated in this proceeding, either by the relator or by the respondent, or even by Keller, had he been made formally a party to this proceeding and had he joined issue.

The only questions which can be presented in a *habeas corpus* proceeding are issues between the State and the prisoner. The remedy cannot be converted into one for a *quo warranto* or *certiorari*.

It is sufficient that the prisoner was committed and is held by the authority of one who was duly elected, commissioned and qualified, and who has continued unmolested, under color of office, at least in the discharge of the functions of a committing magistrate, presiding over a tribunal of recognized legal existence and competency. 33 An. 263; State vs. Carroll, 38 Conn. R.; State vs. Douglas, 50 Mo. 593.

It is not because another person was appointed and commissioned and has qualified as the successor of Falls and claims to be in office

State ex rel. Williams vs. Pertsdorf, Constable.

that Falls has ceased to be a committing magistrate. It may be, on the one hand, that such person is entitled to the office by virtue of his appointment, while, on the other, it is not impossible that Falls may have better rights to it. That person is not recognized by Falls as his successor.

There exists between them a difference, a conflict of pretensions, exclusive the one of the other, which this Court, in this proceeding, cannot adjust, and which can only be inquired into by a court of original jurisdiction and under special legislation enacted for the speedy determination of such matters.

The right of a prisoner in a *habeas corpus* case to put at issue the existence and competency of the court from which the mandate issued is formally recognized, 32 An. 1234; 28 An. 82; C. P. 822 (1); but, in such a proceeding, he is precluded from raising an issue affecting the right of a regular incumbent *de facto*, who holds over as presiding over such a court, when its existence or jurisdiction is not questioned. If the right to hold office be contested, it must be disputed at the instance of the State, in the manner and form pointed out by law. It is a mistake to suppose that it is the duty of everybody to attend to public affairs. 34 An. 263; Wells on Jurisdiction, p. 158; 122 Mass. 445; 25 Ark. 624; 3 Head, Tenn., 690; 29 Pa. St. 138; Acts 1873, No. 11.

As to the prisoner it is indifferent who is entitled to the office. The cause of his uneasiness is his detention for judgment. But, for the law, it suffices that he is confined under the *mittimus* of an officer holding over at least *de facto*, whose authority neither the State nor any one else, not even Keller, has so far judicially attacked.

If, however, a mere usurper should, without *any* color of right, attempt to imprison a person, the legality of the restraint could be inquired into on *habeas corpus*. 17 Wis. 528; 29 Pa. St. 129.

It has been decided that a question of title to an office could not be raised in a *mandamus* proceeding. High on Ex. Rem. 77; 29 An. 399; 12 An. 719; 21 An. 18, 336.

It was also held that such a question cannot be inquired into on a *habeas corpus* granted in favor of a party arrested on a writ issued by an acting officer *de facto* holding over. Sheean's case, 122 Mass. 445, *ex parte* Strohl, 16 Iowa, 369; see, also, Russell vs. Whiting, N. C. L. No. 1, 463; 9 Wis. 264; 17 Wis. 521.

It is likewise settled that the authority of a judge *de facto* to hear a prosecution and convict the accused, cannot, on *habeas corpus* to procure a discharge of the accused, be questioned on the ground that the judge was not lawfully elected. A direct proceeding to try his title is necessary. *Ex parte* Call, 2 Tex. App. 560; C. P. 822; 2 Kent 23; 28 An. 82.

We, therefore, expressly decline to pass upon the question of title

State vs. Smith.

to office, leaving it to be determined in due form at the proper time and place. We simply decide that the *mittimus* emanating from one who indisputably was elected and commissioned and qualified, and who has continued uninterruptedly to act as a committing magistrate, is sufficient authority to the respondent for the detention of the relator. See Hurd on Habeas Corpus, p. 293, and n. 4; p. 296, and note 2.

It is ordered that the application for a *habeas corpus* be refused and that the prisoner be remanded to custody to await his trial.

Mr. Justice POCHÉ, absent during the trial of this case, takes no part in this opinion and decree.

No. 8321.

THE STATE OF LOUISIANA VS. WATKIN SMITH.

Alleged errors or irregularities in the drawing of jurors, cannot invalidate the panel, unless fraud has been practiced or some great wrong committed.

A juror, charged with an offence, such as assault and battery, not punishable by hard labor, is not incompetent.

The appointment of the foreman and the verdict itself may both be verbal.

The verdict being written: "guilty of manslaughter," for manslaughter, is valid.

The sentence is legal though the accused was not asked by the Court if he had any thing to say why it should not be passed. Previous Decisions affirmed.

A PPEAL from the Twenty-second Judicial District Court, parish of St. James. *Cheevers, J.*

F. B. Earhart, District Attorney, for the State, Appellee:

There is no law requiring verdicts to be in writing. 32 A. 854; 8 R. 513, 518; 31 A. 96.

No foreman need be appointed and verdict may be delivered orally. 31 A. 96.

Bad orthography will not vitiate or void a verdict. 32 A. 854, 732; 31 A. 91.

It is not sacramental that prisoner should be asked if he has any thing to say why sentence should not be pronounced, etc. 32 A. 855; 28 Ga. 576; 27 Mo. 324; 33 A. 991.

Polling jury reproves doubt as to verdict. Bishop's Criminal Procedure, vol. 1, 1003, 1004.

There is no educational qualification for jurors or voters in this State. Section 10, Jury Law, Act 44, 1877, covers a multitude of sins of jury commissioners.

J. L. Gaudet for Defendant and Appellant:

Jury commissioners should not allow the names of incompetent persons to remain in the box from which the venire is drawn, otherwise the array will be vitiated. 20 A. 356; id. 442. Persons charged with crime, punishable in the Penitentiary, are incompetent jurors. Act No. 54 of 1880.

A verdict of "mansluder" is null and void, and charges no crime known to the law.

The incompetency of one grand juror will vitiate the whole proceedings. 8 R. 590; id. 616; 21 A. 251.

Before passing sentence upon an accused, the judge, in cases of felony, must ask him whether he has any thing to say why sentence should not be passed upon him. 30 An. 326.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The accused was indicted for the crime of murder. The jury returned a verdict of manslaughter. The judge inflicted a sentence of six months at hard labor, in the State Penitentiary.

Appealing, the defendant claims the verdict and sentence should be set aside; because of informalities in the drawing of the jury; because the grand jury, who found a true bill, was incompetent; because the verdict is null and void; because, before passing sentence, the judge did not ask the prisoner if he had any thing to say why sentence should not be passed on him.

1. The informalities charged in the drawing of the jury, are said to consist in the absence of recitals in the *proces verbal* of the jury commissioners, to the effect, that the clerk had been in custody of the original and general *venire* list; that the box, from which the jury was drawn, had been in the keeping of the clerk; that the box had not been opened previous to the day of drawing; that it was opened in the presence of the commissioners, or of a majority of them; that the names of incompetent persons were placed in the box, notably, that of one Price, who was charged with the crime of *arson*.

It does not clearly appear that the motion was made on the *first* day of the term. It was the duty of the accused to have shown affirmatively that it was so made, by a transcription at least, of the clerk's filing on it or by an extract of the minutes, with the date of the entry. We are left to infer from the date of the action of the Court on it, that it was made the day on which it was overruled, that is, the 25th of June, 1881, necessarily after the *true bill* had been found and returned in open Court by the grand jury. Such things which are of signal importance to the accused, 32 A. 782, should not be left to inference.

Conceding, however, that it was made on the first day of the term, it should not prevail.

Whatever be the grounds relied upon, the motion does not contain any specific charge that "some fraud has been practiced, or some great wrong committed in the drawing and summoning of the jury, that would work a great and irreparable injury."

Mistakes and errors of officers entrusted with the drawing of jurors cannot invalidate the panel, except on such averment and proof in support. Act 1877, No. 44, Sec. 10; 3 Whart. Cr. L. 3378; Graham on N. T. 35; State vs. Dozier *alias* Lobster 33 An. 1362; 31 An. 34; 22 An. 9.

Unless thus assailed, the *procès verbal* cannot be attacked or explained. 31 An. 94, 388; 27 An. 394; 26 An. 580.

2. The charge cannot hold that the grand jury who found the bill was incompetent, because one Ferry, who was one of its members, was disqualified from serving, as, at the time, he was charged with an in-

famous crime or offense punishable by hard labor, etc., and because his incompetency vitiated the whole proceedings.

It is sufficient to say that the existence and nature of the charge is not to be ascertained from the affidavit, as seems to be contended, but from the indictment or information, which was simply for "assault and battery", which is not punishable by hard labor.

3. The verdict of the jury is said to be null and void, because, when the jury returned into court, with their verdict, it was ascertained that the same was not written, or signed by the foreman, who could not write or sign his name, but by another member of the jury, who affixed the name of *Ja Washington*, to the verdict. The District Attorney asked the court to instruct the jury to choose a foreman who could write, if they wanted to render their verdict in writing, or to render it orally. Defendant having objected, the court ordered the clerk to read the verdict, which was announced in the following words: "We are the jury find Watkins guilty of mansluder", "*Ja Washington*." The jury was then polled and separately assented to the verdict, which was ordered to be recorded accordingly.

It is true, there was no man by the name of *Ja Washington* on the jury, but there was one whose name was *Jiles Washington*, a name *idem sonans* and whose identity was not disputed. That irregularity would be trivial and hardly worthy of notice.

There is no law which requires the appointment of a foreman and verdicts to be in writing. Verdicts may be delivered orally. Polling the jury regularizes the proceedings. The member of the jury who wrote what was presented as the verdict and who placed to it, what was supposed to be the name of the foreman, evidently was not sufficiently educated in the orthography of law terms to write the word "*man-slaughter*" correctly, but he wrote it in such a manner as to make the verdict fully intelligible and a sufficient basis for record and judgment.

In the case of *State vs. Ross*, 32 An. 855, where the verdict was "*Guilty witholt capitel purnish*", the court held that it was not illegal and approved the judgment. 32 An. 782; 8 R. 513, 518; 31 An. 91, 96, 369.

The law does not require jurors to be philologists. All that the law requires is their ability to appreciate the facts and to apply the law. When they have done that and expressed their sense in an intelligible and unequivocal form, the law is satisfied.

4. The last ground is untenable, that the record does not show that the accused was asked before sentence, whether he had anything to say why sentence should not be passed upon him. It does not appear that the accused asked to speak before sentence was passed.

The more recent and considerate authorities and rulings on this

Lewis et al. vs. Pepin, Tutrix.

point are that it is not sacramental that the prisoner should be thus interrogated. 28 Ga. 576; 27 Mo. 324; therefore, that its entire omission is not fatal to the sentence. 32 An. 855; 33 An. 991.

The *obiter dictum* in 30 An. 326, that it is well to observe this ancient form, even if it went to the extent claimed by the appellant, could not be invoked to outweigh those authorities and invalidate the judgment. Judgment affirmed.

No. 7289.

MRS. BERTHA LEWIS ET AL. VS. WIDOW J. F. PEPIN, TUTRIX.

An Appeal cannot be dismissed on the ground that it was taken by a tutrix, defendant in the case, and that her wards were of age at the time and should have taken the Appeal themselves,—when the Record does not show that said wards were made parties to the suit at their majority.

The failure of the lessor to make necessary repairs, does not afford the lessee a legal reason for not paying the rent, or sustain a claim for the damage suffered by his furniture from the bad condition of the leased premises,—when the rent is sufficient to enable the said lessee to make the repairs himself. Previous Decisions affirmed.

This principle is equally applicable when the lessee has furnished rent notes, if they are still in the hands of the lessor.

A PPEAL from the Sixth District Court for the parish of Orleans.
Rightor, J

B. R. Forman for Plaintiffs and Appellees.

Chs. F. Claiborne for Defendants and Appellants.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

DEBLANC, J. In July, 1868, Mrs. Bertha Lewis leased certain houses in this city from A. Rochereau & Co., as agents of the heirs of J. F. Pepin, who then resided in France.

According to the allegations of a petition filed in the Second District Court of the parish of Orleans, by the said A. Rochereau & Co., to be recognized as the agents of Mrs. Widow Pepin, in her own name and as natural tutrix of her children, the lessors of plaintiff, those children were born—one in April, 1852, the other in April, 1855, and became of age, the oldest in 1873, the youngest in 1876.

On the 3rd of May, 1870, Mrs. Lewis brought suit to annul the lease made in 1868, and to recover damages which she charges resulted from a failure on the part of her lessors to comply with their contract.

Though they and their tutrix were represented in this city by A. Rochereau & Co., who had been recognized as their agents by the court and by the plaintiff, the tutrix appears to have been cited to defend said

Lewis et al. vs. Pepin, Tutrix.

suit "by posting and through a curator *ad hoc*"; as to said agents, they were made parties to the instituted action for the sole purpose of enjoining them from negotiating, and compelling them to return the rent notes subscribed by and delivered to them by Mrs. Lewis as lessee.

At the inception of this litigation, there were in court and in this case but two defendants, Mrs. Widow Pepin as tutrix, the firm of A. Rochereau & Co., as holders of the lessee's notes. The case was tried and judgment rendered against *defendant*, annulling the lease, and condemning *defendants* to pay seventeen hundred and fifty dollars and return the rent notes.

From that judgment a suspensive appeal was prayed for and allowed, on motion of Charles F. Claiborne, of counsel for *defendant*. The record contains the mention that at the trial Mr. Claiborne appeared for Mr. Bermudez, defendants' counsel. The bond of appeal is in the name of Widow J. F. Pepin et al., and recites that: "Whereas, the above bounded Widow J. F. Pepin, tutrix, et al., has this day filed a motion of appeal from a judgment rendered *against her*, etc.

Mrs. Lewis took a rule in the lower court to dismiss this appeal, on three different grounds, only one of which is now urged, and that is that the heirs of Pepin are of age and they have not appealed. To establish that they have attained the age of majority, the only evidence adduced on the trial of the rule is the petition of A. Rochereau & Co., addressed to the Second District Court, and in which the children's age is mentioned. That rule was discharged by the District Judge, and the motion to dismiss renewed in this Court.

The heirs of Pepin were under age when this suit was brought, and it does not appear that, at any time, they were made or made themselves parties to said suit; and if, as contended, from 1876 neither of them could have been legally represented by their mother and tutrix, because at that date they alone could have stood in judgment, the validity of the decree rendered against them in 1878 would be at least questionable.

The documents to which we have been referred do not sustain the assertion that the heirs of Pepin have, since their alleged majority, appeared in court by counsel or otherwise. The defendant and the defendants therein alluded to are the tutrix and her agents, and the cause urged for the dismissal of the appeal might, if it were to prevail, extend to and affect the validity of the judgment appealed from and blot out the result of a protracted litigation.

Were the unsworn allegations of the petition of A. Rochereau & Co. considered as sufficient evidence of the heirs's majority, though it is manifest that the ascertaining of their age was absolutely foreign to the object of that petition, where is the evidence that they were ever informed,

Lewis et al. vs. Pepin, Tutrix.

either by their tutrix, or by any other, and in any way, that there was pending in one of the courts of a distant State a suit in which they would have to file an appearance.

Was it not incumbent on plaintiff, as soon as she ascertained that those heirs were of age, to have notified them of the institution and pendency of her suit; and can she now, taking advantage of her own laches, claim the dismissal of an appeal allowed to one of the only defendants who were in court when the case begun, when it was tried and when it was decided? C. P., 120. We think not, and, in the interest of plaintiff and defendants, the motion to dismiss is overruled.

ON APPLICATION FOR REHEARING.

We thought and still think questionable that a judicial admission made, not by a tutrix herself, but by her agent, and made, not in a suit actually pending against her wards, but in a previous proceeding, can, in a subsequent suit against those wards, be justly considered as the highest evidence of the fact acknowledged in the agent's admission.

Be this as it may, the Civil Code expressly provides that a tutor administers by himself alone—Art. 351. The Code of Practice, "that action *against* minors must be brought directly against their tutors—C. P. 115; and that in all suits brought in their name, their tutors *act themselves without making them parties* to the actions—C. P. 109. They are sued or sue through the interventions of their tutors—C. P. 108.

The Code of Practice also provides that all suits brought against curators and *other administrators* (in the last mentioned class tutors are included), and brought *during* the time of their administration, shall, *after* the expiration of their time as to tutors, that is, when their wards attain the age of majority, and even after they, the curators and other administrators, have rendered their accounts to the heirs, be continued and tried without any other formality, except that of *making the heirs parties*, which shall be ordered by the court on motion of any one of the parties, or on application of such heirs themselves. C. P. 120.

How, in a court of record, do we ascertain who are or have been made parties to a suit? Is it by merely inquiring *who ought* to have been cited or notified, or is it by opening the file and referring to citation and notices, if any there be, and to the returns thereon? By what fiction of the law can those who were minors, and not in court when a suit was commenced, be *presumed* to be in court on the very day on which they attain their majority, though the contrary may appear?

In "*Martel vs. Richard*," what did the court hold? That the tutor represents the minors so completely, that when he has once brought a suit for them, or answered an action against them, no further *petition* or *answer* can be required on their behalf, and the court added: "That

Lewis et al. vs. Pepin, Tutrix.

care should be taken in an action of that kind, that judgment should be rendered in favor of those heirs who have attained their majority, as well as the tutor of those who are still minors." The court meant that a suit properly brought by the tutor for his ward may be prosecuted by the ward, as a plaintiff, after attaining his majority, without the necessity of a new citation or any change in the tutor's pleadings, but it did not hold that a valid judgment can be rendered against a defendant who has not been cited or notified, and has not appeared.

If the court had so decided—if it had decided that the fact that, when the suit was filed, the tutor alone was in court, created, as to that suit, a tacit agency, and, by implication, empowered the tutor to continue representing his ward, after the latter had attained the age of majority, then, under the quoted authority, the appeal taken by the tutrix of defendants would be properly before us. 15 An. 598.

We have here, as parties to this appeal, all those who appear to have been in the lower court from the inception of this suit until this appeal was granted, and no cause has been shown to justify its dismissal.

The rehearing is, therefore, refused.

ON THE MERITS.

The opinion of the Court was delivered by

FENNER, J. In July, 1868, plaintiff leased from defendants, through the latter's agents, A. Rochereau & Co., the buildings known as the Orleans Hotel, for the term of two years from October 1st following, at a stipulated rent of \$2400 *per annum*, represented by plaintiff's negotiable notes for \$200 each, payable monthly during the whole term of the lease.

It was expressly stipulated in the lease that the lessee should "keep the premises in good order, condition and repair during said lease," and, at its expiration, "should deliver said premises unto the said lessors in like good order, condition and repair in which she received them, the usual decay and unavoidable causes only excepted."

She entered upon the occupancy of the premises, and paid her rent notes to the defendants for nineteen months, up to May, 1870, when she instituted the present suit, claiming the annulment of the lease, and the cancellation and return of the five unpaid rent notes; enjoining Rochereau & Co. from parting with the possession of the notes; and demanding \$7000 as damages resulting from the failure of defendants to perform their obligations as lessors. She alleges, in substance, that almost immediately after taking possession of the premises, she discovered that the roof leaked badly and did not protect the furniture; that she immediately made demand of said Rochereau & Co. to repair the roof, which

they failed to do; that the roof grew worse and worse until the house became untenable; that during every hard rain the rooms were flooded, in consequence of which her furniture had been damaged to the amount of \$4500, and she had suffered a further loss of custom and profit in her business of hotel-keeping to the amount of \$2500.

The defendants answer, in substance, that the premises had been delivered in good order; that plaintiff was bound, by her contract, to keep them in good repair; that, when notified that the roof needed attention, although not so bound, they sent workmen to put it in repair; that it was ascertained that the cause of its leaking was the negligence and misconduct of plaintiff and her employees in walking upon the roofs and valleys, stretching clothes-lines and hanging clothes thereon, and throwing broken bottles, rags, dirt and filth in the gutters so as to obstruct them and cause the leakage; that even if defendants were in fault, plaintiff cannot recover damages because she had the right to make the repairs and deduct the cost from the rent. Defendants demand, in reconvention, judgment for the unpaid rent-notes and \$1000 as damages for injury to the house resulting from the leakage caused by her acts.

From a judgment in favor of plaintiff for \$1750 damages, annulling the lease, cancelling the unpaid notes and rejecting the reconventional demands of defendants, the latter have appealed.

There seem to be several sufficient reasons why this judgment cannot be sustained:

1st. The express undertaking of plaintiff, in her lease, to keep the premises in good repair, relieved the defendants from the obligation which the law would otherwise have imposed on them, of making repairs to the roof. The stipulation that she should return the premises "in like good order, condition and repair in which she received them" certainly strongly suggests an implied acknowledgment that she received them in good order, condition and repair. The evidence establishes that she had occupied the premises, under a sub-lease, for several months prior to the commencement of this lease, and she should, therefore, have known its condition. There is no evidence to establish that immediately prior to, or at the time when the lease begun, the roof was in bad condition. It is proved, on the contrary, that the defendants had employed a competent workman to put the roof in repair, who had done the work and guaranteed it for twelve months.

2d. The evidence as to the cause of the leakage is extremely conflicting. It is conclusively proved that the roof was used for drying and bleaching clothes; and that slops, chamber dirt, old shoes, rags, broken bottles, a flannel shirt, an india-rubber coat and such articles were, at various times, found on the roof and in the valleys and gutters, ob-

Lewis et al. vs. Pepin, Tutrix.

structing and choking them up; and sundry competent witnesses testify that this was a sufficient, and the actual, cause of the leaking. Plaintiff's evidence as to the fact of leakage and as to damage is certainly complete; but it must be conceded that, as to the cause of the leakage, the testimony on her side is of the weakest character and the evidence overwhelmingly preponderates in favor of the theory of defendant, not only in the number of the witnesses on that point, but in their capacity to judge and in their opportunities of knowledge. It was essential to plaintiff's success that she should establish with clearness and certainty, that the damage resulted from the fault of defendants and not from her own, or that of her employees and customers. This she has failed to do.

3d. The judicial construction of Art. 2694 C. C., is to the effect that the failure of the lessor to make repairs will not sustain a claim for damages by the lessee, when the rent is sufficient to enable the lessee to make them, because, in such case the lessee is authorized to make them himself and to deduct the cost from the rent. However questionable this construction might appear, as an original proposition, it is too ancient and well established to admit of disturbance at this date. 4 Rob. 428; 21 An. 714; 22 An. 292; 23 An. 59; 26 An. 384; 28 An. 903; and *Lawrence vs Lelièvre*, unreported, Op. Bk. No. 50, p. 57.

In the last mentioned case, it was held that the application of the doctrine was not prevented by the circumstance that negotiable notes had been given for the rent, at least in absence of proof that the notes had been negotiated. Here it well appears that they had not been negotiated and that the plaintiff knew the fact. The notes were always paid by her to defendants' agent, and, in some cases, she applied for, and obtained concessions on her rent, on account of bad business. She might, at any time, have prevented their negotiation by the same proceeding which she effectually used with reference to the last five notes of the series.

She claims, however, that the repairs would have exceeded the amount of rent for any single month and she was not bound to advance a greater sum. We are not satisfied that such was the fact, but, if it were, she had only to withhold payment during the period necessary to accumulate a sufficient amount of rent due; and could only hold the lessor for damages accruing during that period.

4th. Plaintiff's conduct during the whole transaction shuts out her claim from all equitable consideration. During nineteen months, in which the enormous damage claimed by her was accumulating, she says not a word to defendants' agents about holding them responsible therefor. On the contrary, she went regularly forward paying them the rent every month—acts certainly inconsistent with the idea that she considered

Hopkins et al. vs. Succession of Daunoy.

them to be indebted to her for a much larger amount. It appears, as before stated, that she even applied to them, in some cases, for concessions on her rent, on account of bad business, which were allowed. At the end of nineteen months, on the eve of the dull summer season preceding the termination of her lease, she, for the first time, springs upon the defendants a claim for damages nearly doubling the entire rental of the property for the whole two years, and claims a rescission of the lease and a cancellation of the maturing rent-notes. See *Campbell vs. Miltenberger*, 26 An. 72, many of the principles announced in which are strikingly applicable to this case.

While we do not hold that the payment of rent operated a legal waiver of the claim for damages, it is a circumstance strongly suggesting that she did not, during all this period, herself consider defendants her debtors for the large amount now claimed, and confirming the probability of defendants' position that they were not so bound.

Even after the institution of the suit, she continued to occupy the premises down to the very end of the lease; availing herself, however, in the meantime, of the pendency of the suit, to sell out her furniture, and to deprive the landlord of his lien thereon for rent.

We are constrained to reject her claim for damages and to hold her liable for the unpaid rent.

It is, therefore, adjudged that the judgment appealed from be annulled and reversed; and it is now adjudged and decreed that plaintiff's demands be rejected, and that defendants have judgment in reconvention against plaintiff in the sum of one thousand dollars, amount of unpaid rent notes, with five per cent per annum interest on the amount of each note from the date of its maturity; plaintiffs to pay costs of the lower court and of this appeal.

The Chief Justice recuses himself, having been of counsel.

No. 7137.

ALFRED H. HOPKINS ET AL. VS. THE SUCCESSION OF MRS. MATHILDE DAUNOY.

The purchaser at a tax sale, which is decreed null and void, is entitled to recover from the owner of the property such portion of the price of adjudication as went to the payment of taxes, but not the amount of the costs, penalties and interest. 33 An. 521.

A PPEAL from the Fourth District Court for the parish of Orleans.
Houston, J.

Plaintiffs and Appellees unrepresented.

Thos. J. Semmes for Defendant and Appellant:

Hopkins et al. vs. Succession of Daunoy.

Price paid by purchaser at a tax sale, and applied to payment of taxes, may be recovered by the purchaser from the owner, even though the sale be invalid, and even though the assessment be irregular. There is a natural obligation to pay taxes for the support of the government, and, besides, our laws provide for supplemental assessments. 8 La. 502; 2 R. 225; 16 An. 132; 12 An. 535; 29 An. 416; 32 An. 228, 1136 and 1292; 30 An. 310 and 1232; 15 An. 90; 12 An. 34; 25 An. 457; 5 N. S. 592.

Property assessed as "Hopkins Plantation," on Gentilly Road, in Eighth Representative District, composed of squares, the numbers of which are given, and also the number of arpents on both sides of Gentilly Road, the owner being dead and his heirs numerous, is properly assessed under Act No. 114 of 1869, and Act No. 42 of 1871. 26 Pa. 432; 24 Id. 337; 49 Id. 440; 18 Md. 1; 23 Calif. 287; 29 Id. 326.

The opinion of the Court was delivered by

TODD, J. Mrs. Mathilde Daunoy, on the 3d of April, 1875, purchased at tax sale the property described in the petition.

The plaintiffs sue to annul the sale and recover the property. The defendant admitted the nullity of the tax sale, but claimed in reconvention the reimbursement to him of \$2049 85, the price paid at the sale, which had been applied to the payment of taxes on the property, costs, penalties and the expenses of the sale. The sale was annulled, and the demand in reconvention rejected; and from this judgment the defendant has appealed.

From this statement it will appear that the only question for decision is, whether the reconventional demand was properly rejected.

Though the nullity of the tax sale was admitted by the defendant, it is not pretended that the property in question was exempt from taxation, or that it was not properly subject to the taxes charged against it. The sale was annulled because of defects or irregularities in the assessments, and the proceedings taken to sell the property. The payment made by the purchaser, at the sale, relieved the property of a charge to which it was legally subject. It inured directly to the plaintiffs' benefit, for it saved them from the payment of a like amount to the State—at least to the extent of the principal of the taxes. Under the laws then existing, though the assessments were illegal, the property could have been re-assessed, and the taxes collected under such re-assessment. Sec. 28, Act of 1871, p. 113; Act 1869, p. 153; *Stafford vs. Twitchell*, 33 An. 521.

In the case last mentioned, *Stafford vs. Twitchell*, we recognized the justice of such a claim, and required the amount paid by the purchaser at a tax sale—which was pronounced a nullity—and applied to the taxes on the property at the time of sale, to be reimbursed to such purchaser.

The principle on which the claim rests is plainly embraced in the equitable maxim, that "no one should be permitted to enrich himself at the expense of another," and is clearly sanctioned by the Code, Art. 1965.

State ex rel. Buisson et al. vs. Lazarus, Judge, et als.

This right to be reimbursed cannot, however, be extended to the costs and penalties paid. They grew out of, and resulted from the illegal tax proceedings, and present no legal or equitable claim for payment. The interest, too, must be disallowed. The admission of the nullity of the sale covers the want of a legal demand or notice to pay the taxes; and there was no legal assessment.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court, so far as it decrees the nullity of the tax sale, be affirmed; and so far as it rejects the demand in reconvention, it is annulled, avoided and reversed; and it is now ordered, adjudged and decreed that the defendant, the Succession of Mathilde Daunoy, deceased, recover of the plaintiffs the sum of one thousand and eighty dollars, with legal interest from the 6th of May, 1876,—one-seventh of said sum and interest to be paid by each of the following named plaintiffs, to wit: Alfred H. Hopkins, Octave Hopkins, Hugh D. Hopkins, Evelyn Hopkins, widow of O. Byrd, Delphine Hopkins, wife of Edmond Durel, one-seventh jointly by the children of Henry Hopkins, deceased, as named in the petition and answer, and one-seventh jointly by the children of James Hopkins, also named in the petition and answer. The costs of the appeal to be paid by the appellees, as also the costs accruing in the lower court from the reconventional demand, the remaining costs of that court to be paid by defendant.

ON APPLICATION FOR REHEARING.

TODD, J. A re-examination of the record satisfies us that an error was made in our former decree as to the amount of the principal of the taxes paid by the purchaser, Mrs. Daunoy, at the sale of the property. The amount was \$1183 55, instead of \$1080, stated in our former decree. This must be corrected.

It is, therefore, ordered, adjudged and decreed that our former decree be corrected and amended by condemning the plaintiffs to pay to the succession of Mrs. Mathilde Daunoy eleven hundred and eighty-three and fifty-five one hundredths dollars, with interest at the rate and from time mentioned in said decree, to be paid in the proportions stated therein by the several plaintiffs, and as thus amended and corrected our former decree is reaffirmed.

No. 8328.

THE STATE EX REL. E. BUISSON, ET AL., VS. H. L. LAZARUS, JUDGE, ET ALS.

Under the provisions of Article 130 of the Constitution, any one of the five judges of the Civil District Court for the Parish of Orleans, has the power of issuing interlocutory orders, besides conservatory writs, in any cause pending in said Court, in case of absence, sickness or other disability of the judge to whom such cause was originally assigned.

State ex rel. Buisson et al. vs. Lazarus, Judge, et als.

By the terms of the same Article of the Constitution, the judge to whom a cause has been assigned, has alone the power of rendering judgment on the merits of the case. But the Constitutional direction is not one of public order, and does not strike with absolute nullity such a judgment when rendered by any other of the five judges. The parties to the suit themselves may consent that the judgment be so rendered. Therefore, a judgment rendered by another judge than the one to whom the cause was assigned, in case writs of absence or other disability of the latter, may be valid, if no timely opposition or objection is made thereto.

APPPLICATION for writs of Prohibition and Certiorari.

G. Duplantier for the Relators.

W. E. Murphy and *Thos. J. Semmes* for the Respondents :

First—The relators are not entitled to the relief claimed, the case being appealable. C. P. 857 ; State ex rel. vs. Skinner, Judge, 33 An., p. 1092 ; State ex rel. Debuys vs. Judge Civil District Court, 32 An 1256.

Second—The relators have not served the notice required by Sec. 2 of Rule XII, of the rules of this Honorable Court to obtain their writ of Prohibition.

Third—Relators have not filed any transcript of the proceedings in the court *a qua*, and the Court cannot pass on their demand.

Fourth—The relators having acted on and sanctioned the different proceedings complained of, cannot have the same avoided by a writ of *certiorari*. C. P. Art. 864 ; State vs. Judge City Court, 33 An. 15.

Fifth—Art. 130 Constitution, in case of the absence or sickness of any one judge of the court, authorizes any other judge to issue conservatory writs or orders, etc.

Sixth—A judge of one of the divisions of the Civil District Court being absent from the State, or unable, from sickness or other cause, to hold court, another judge of the court can replace him during said absence. Acts of 1855, No. 225 (p. 317), Sec. 13 ; Acts of 1865, No. 44 (p. 82), Sec. 3 ; Widow J. C. St. Romes vs. The Levee Steam Cotton Press Co., 5900 (1876) of this Court (not reported), affirmed by this Court in same case ; 3 An. 224.

The opinion of the Court was delivered by

BERMÚDEZ, C. J. This is an application for a prohibition and for a *certiorari*.

The complaint is, that the defendant, who is one of the recognized judges of the Civil District Court for the parish of Orleans, has usurped judicial powers, with which he was not clothed, but which were and are vested in another judge of the same court, and that, in the prohibited exercise of the same, he has illegally made several decrees and rendered a final judgment which operate to the injury and detriment of relators.

The defenses are : the appealable character of the suit in which the defendant acted, a denial of the usurpation charged, and a consequent vindication of the acts assailed.

We will premise that a writ of prohibition can issue, on a proper showing, in any case, whether appealable or not, at the discretion of the Court, to arrest a judicial usurpation of authority ; and that the production of the record, under the *certiorari*, can be dispensed with, the

averments of facts in the petition not being controverted. We will add that we cannot, in an application for the last proceeding, pass upon the intrinsic correctness of the judicial acts complained of, and that we can only determine, in such a case, whether they were or not done according to the forms prescribed by law.

After thus disembarassing the case, we will now proceed to consider the matter before us in one respect only, which is decisive of the controversy.

The dominant question is : Whether one of the judges of the said court can lawfully act in the place of another judge of the same court, absent on executive leave.

For a proper determination of that novel and important question, we think it advisable to divide the inquiry, and, in so doing, to ascertain :

I. Whether such judge can act at all, in the place of another, and if so, in what particular cases.

II. Whether he can so act by virtue of law in *other* cases, not specially provided for.

III. Whether he can act in all cases by consent of parties.

1. A perusal of article 130 of the Constitution, under which the question is presented, impresses the mind with the conviction that its framers intended to provide for a speedy, full and impartial administration of justice by the courts which it creates and organizes.

The article, above all, contemplated a suppression of the opportunities for conflicts of jurisdiction or want of jurisdiction which too frequently occurred under the system of courts previously existing in the parish of Orleans.

Its object was, by creating one Civil District Court *only*, to blend all probate and civil jurisdiction, in all cases in which the matter in dispute would exceed two hundred dollars, and to provide for an equal, indiscriminate distribution by allotment and assignment of such cases among the judges composing it, in accordance with rules to be adopted to that end.

It is apparent that the Convention intended that a judge to whom a cause would be thus allotted and assigned, should have "exclusive control over it from its inception to its final determination ;" but, in their wisdom, its members foresaw the certainty, that a judge to whom a cause might have been thus allotted and assigned, would, at times, be either legally or physically incapacitated from passing upon it. They foresaw the cases in which a judge would have to recuse himself, would be absent, sick, or otherwise prevented from trying the cause. They foresaw besides, cases of vacancy, from any cause, and they proposed to provide for these contingencies.

They declared that, in cases of recusation and of vacancy, the cause allotted and assigned should be re-allotted and re-assigned to some other judge who, necessarily, would exercise over it the same exclusive control, which he would have had, if it had been originally allotted and assigned to him.

As to the other cases in which the disability was to be physical, whether on account of absence from the parish, or of sickness, the Convention viewed them and dealt with them as to be of short duration, omitting to provide expressly for the determination of causes on *their merits*, in cases of protracted sickness or absence.

The relators admit that, in the case of a temporary absence, the defendant judge would have had the right of replacing the absent judge, but they claim that he would have had the right to do so *only* for the purpose of issuing conservatory writs, and for none other. They conclude that, as long as the absence lasted, no order whatever could be legally made in the case, either by the defendant judge or any other judge of the court.

We do not read the article in the same light. We do not believe that it contains any useless language or illogical and hurtful tautology. After a careful examination and mature deliberation, we find that the article wisely provides that, in case of absence from the parish of a judge, any other judge shall have power, not only to issue conservatory writs, but also to grant "*orders*."

As was well observed by the learned counsel for the relators, there exists such a vast difference between conservatory writs and interlocutory orders, that in no instance can they be assimilated or confounded.

Conservatory writs are provisional safeguards, granted at chambers and on *ex parte* showing. Interlocutory orders are decrees subsequently made, sometimes in the same manner, or in open court, or contradictorily, on preliminary or incidental matters, and preparatory of the case for a decision on its merits. The power to issue the writ, when vested in a judge, implies that of dissolving it. Orders for conservatory writs are not liable to be suspended by appeal, while some of the others, likely to occasion irreparable injury, can be kept in suspense in that manner. We do not perceive that the Constitution, in article 130, uses the word "*orders*" as synonymous of "*conservatory writs*." The word is employed without any qualification or restriction, and, therefore, applies to *all conservatory orders* which justice may require to have made, in the course of judicial proceedings, exclusive of judgment on the merits. The provision authorizes both: the issuance of conservatory writs *and* the granting of conservatory orders. It, therefore, includes interlocutory orders of the nature of those made by the District Judge, and which consisted merely in rescinding an order for an

injunction, owing to the insufficiency of the surety and in requiring another.

Finding, as we do, that the District Judge had the right to grant those conservatory orders, that they appear to have been made after observance of the forms of the law, we have no authority to pass upon their correctness in the proceeding for a *certiorari*. If the case be, as it is claimed, within our appellate jurisdiction, and those orders are brought up for review, then we will inquire into such correctness, and not otherwise.

2. Since the word "*orders*" can be so interpreted as to cover only interlocutory orders or decrees of a conservatory character, it is irresistibly clear, that the action of a judge on the merits of any cause not allotted and assigned to him, but to another, who happens to be sick or absent, is wholly unauthorized. Hence, the District Judge in this case cannot be justified in rendering the judgment of dismissal which is attacked by these proceedings.

3. The fact having arisen, however, that such judgment was rendered, the question forces itself, under considerations of public policy, whether it is absolutely or relatively null, void or voidable, and whether an enforcement of it by the judge who rendered it, would constitute such usurpation as would warrant the issuing of the prohibition asked.

It is argued that, from the fact that, in clear terms, the constitutional article under consideration provides that the judge to whom a cause shall have been allotted and assigned, shall have *exclusive control* over it, from beginning to end, it follows that it impliedly prohibits every other judge from taking jurisdiction over it, unless in case of absence or sickness, and then only for certain purposes, and, therefore, from passing upon its merits. That is undoubtedly so; but is that bare, implied prohibition such, that individuals cannot renounce the benefit of an allotment or assignment, established in their favor, when such renunciation is not actually prohibited, when it does not affect the rights of others and is not contrary to public good? We do not think it is.

In his work on the theory of nullities, Solon says: "*Dans le doute si une nullité est d'ordre public, ou de droit privé, le silence du législateur doit être interprété en ce sens, que la nullité n'a été portée que dans un intérêt privé. On conçoit, en effet, que si elle était d'ordre public, le législateur l'aurait exprimé, ou, du moins l'aurait donnée à connaître. Dans le doute, on doit toujours se prononcer pour la validité de l'acte. Et hæc quidem interpretatio per quam actus sustinetur, dicitur regina interperlationum.*" Declus in Leg. No. 11, Cod. de Milli. Testa. Solon vol. 1. p. 12, No. 23; also p. 4, No. 7 and following paragraph.

Dunod, an author also of acknowledged distinction, says: "*Quoi-que la fin de la loi soit toujours l'intérêt public et de la société, la vue de*

cet intérêt est souvent éloignée, et la loi considère alors, en premier lieu, dans sa prohibition et dans les nullités qu'elle prononce, l'intérêt des particuliers. *Primario spectat utilitatem privatam et secundario, publicam.*"

Toullier lays down, as a general rule, that an individual has always the right to renounce the benefit of laws which have been enacted for his benefit; that the cases in which he cannot do so, form the exceptions and are confined within narrow limits. They are: 1. where the law has itself prohibited any deviation from its provisions; 2. where the disposition is absolutely prohibitory; 3. where the law has for its foundation, some public or political cause, or the interest of third persons. See Toullier vol. 1, No. 101 to 111; also Merlin R. J. vol. Renonciation No. 1; Zachariae vol. 1, p. 64; Duranton, vol. 1, p. 25, No. 110; Marcadé, vol. 1, p. 671; Dunod Presc. 1ère Part. C. 8, p. 47; Laurent vol. 1, p. 82 et seq. Pandectes françaises. See also; 3 An. 328; 10 M. 226; 6 L. 60; 18 An. 68, 148; 33 An. 662.

Indeed the maxim of the Roman law upon which the theory and conclusions of those commentators are made to rest, is to the effect: *Regula est juris antiqui, omnes licentiam habere jus quæ pro se introducta sint rememurare.*

Under the weight of these authorities, we consider that the nullity resulting from the rendition of a judgment, in disregard of the constitutional provision under the circumstances of this case, is not absolute, and is, therefore, relative and curable.

A judgment is absolutely null, either, when it is rendered by a court having no jurisdiction *ratione materiæ et personæ*, or having jurisdiction *ratione materiæ* only, even if the parties acquiesce in it, for such consent cannot give jurisdiction. In order to determine whether the court is incompetent, the test is whether, on the face of the papers, it had jurisdiction of the subject matter and of the persons of the litigants.

If it have neither, it is incompetent. If it have not the former, it is also incompetent. If it have the former, but not the latter, and objection was seasonably raised and overruled, it is incompetent. If it have the former and not the latter, but the parties have expressly or impliedly submitted to its powers, it is competent.

In the two first instances, the incompetency is absolute and cannot be cured. In the third instance, it is relative and curable; in the last instance, the competency is as absolute as where a court has jurisdiction both *ratione materiæ* and *personæ*.

In the case of the relative incompetency, the resulting nullity is for the benefit of individuals who can waive their objections, in advance, or ratify the act subsequently.

In cases of absolute incompetency, or want of jurisdiction, the

remedy would be a prohibition from this Court, under article 90 of the Constitution, unless, in appealable cases, parties prefer having the question of nullity determined on appeal. Judgments absolutely null on the face of the papers have no bottom upon which to stand. They require no suit in nullity to be avoided, as they can be collaterally attacked. Not being susceptible of ratification, it is struck with sterility and can produce no effect whatever.

We do not think that in testing the jurisdiction of a court in that manner, in cases like the present one, judicial inquiry is to be extended to what intervened or not before judgment, unless on averment made and established, that valid, seasonable objection was urged and disregarded.

It is manifest that the Civil District Court, in this case, was fully competent, as a court, *ratione materie et persone*.

The objection of incompetency, from which the charge of usurpation of powers spring, is not levelled at the judicial power of the court, as a constitutional organization for the administration of justice, in all civil cases contemplated; but it is directed against the right of one of its members of exercising them, who, in certain contingencies, provided by the Constitution, could have lawfully wielded all of them, independently of the will or consent of litigants amenable to the court. The contention is, that no contingency contemplated by the organic law has arisen, which has put into activity the right of the judge to exercise the powers of the court, which are dormant in him, until such contingency occurs. In other words: the objection is aimed, not at the jurisdiction of the court as a court, but at the irregularity of the mode, or illegality of the process, by which the cause appeared before the judge and was passed upon by him. It goes to the administrative power of regulation exercised by the judge, in disposing of the suit, *quasi* on its merits, but not really so, as he merely dismissed the proceeding, as in case of non-suit, with costs.

In the absence of any timely opposition on the part of the defendants in the action, it was illicit, but not illegal, for the District Judge to have entertained the motion to dismiss the case and to have granted it.

We do not think that the judgment so rendered is a nullity, voidable either by action or appeal, and that it is competent for this Court, in the exercise of its plenary powers of supervisory control over inferior courts, to prohibit the District Judge from executing the judgment by coercing the payment, by the plaintiffs, of costs incurred by the defendants in the defense of their rights.

Our reason is: that no objection was raised by the defendants to the action of the judge, who exercised on the occasion, if not the powers of a judge *de jure*, at least those of a judge *de facto*.

State ex rel. Buisson et al. vs. Lazarus, Judge, et als.

If the judgment were null, it would not be absolutely so, because rendered in disregard of a constitutional provision, prohibitory by implication, as, that provision is not one enacted exclusively for the public good and the maintenance of public order; but is one also for the benefit of litigants, who can waive the allotment or assignment to which it refers.

The judgment might be a nullity and the judge might be prohibited from executing it in any manner, had it been rendered *without* the assent, express or implied, of the relators, or in defiance of their solemn protest. Their inferred acquiescence is not lacking in the instant case.

If, instead of being, as it is, a mere judgment of dismissal, which passes on no issue, which pronounces neither for nor against any one and which leaves the door open for a new proceeding, the judgment complained of were one really on the merits of a controversy, setting it at rest, it would have been such a judgment as could have acquired the force of *res adjudicata*, because rendered by a judge *de jure* and *de facto*, in the name of a court competent *ratione materiæ et personæ*, although, perhaps, in contravention of a regulation of public concern; for it is the interest of the commonwealth that there be an end to litigation.

The importance which the law attaches to the authority of the thing adjudged is such, that in none but clear cases will it permit that a controversy, apparently adjusted by a final judgment of competent judicial authority, be unravelled and that the differences of parties be again agitated in the *forum*. It is from that standpoint that the Court of Cassation of France, has twice declared, with the high authority to which civilized countries recognize that it is entitled, that the proposition is such a *constant principle* that it is almost axiomatic.

“L'autorité qui s'attache à la chose jugée est si absolue qu'il est interdit d'y porter atteinte alors même que le jugement du quel elle résulte, aurait méconnu ou violé des règles de compétence, fondées sur des motifs d'ordre public.”

J. P. 1867, 20 août 1867, p. 1082 ; 1872, p. 973.

The Court of Cassation of Belgium has ruled in the same sense. See Pasiricrisic, 1843, p. 150; 1857, p. 165 ; also Dalloz, 1867, 1, 376 ; Pasiricrisic, 1836, 2, 207.

In *Moses vs. Julian*, 45 N. H. 53, the Supreme Court of that State has, in an elaborate and learned opinion, summed up the matter of disqualification, under fifteen different heads, among which are the following :

In cases where the statute does not make the proceedings void, parties must object before trial, or the objection will be waived. *

* * Unless the statute forbids, parties may expressly waive

State ex rel. Buisson et al. vs. Lazarus, Judge, et als.

objection, which is called in Civil and Scotch law *prorogated jurisdiction*. In the case of *Schenly vs. Commonwealth*, 36 Penn. St. p. 29, it was distinctly held that an objection which goes not to the judicial power of the court, but to the mode in which the case is brought before it, will not avail the defendant, after appearance and plea in bar.

See, also, 45 Ala. 513, *Hine vs. Hussey*.

It is, then, manifest and indisputable that, had the defendant judge passed upon the merits of the controversy, as raised in the petition, either by annulling the judgment and the sale attacked, or by maintaining both, the judgment thus rendered would not have been an absolute nullity on the face of the record, consisting, as it would have, of the petition, answer and judgment.

The court was competent *ratione materiæ et personæ*; the defendant judge was a judge *de jure* of that court, authorized to exercise all its judicial powers, and had done so.

It would not be legitimate to go behind the judgment to ascertain whether the case had been or not allotted to the judge who decided it, to determine of the validity of the judgment in such a case. We repeat that it would then have been such a judgment as could have acquired the force of *res adjudicata*.

The doctrine extends even to the trial of a case by a judge *de facto*. One who supposes himself to be invested with office, and who, not being a mere intruder or usurper, acts in good faith as a judge, may constitute a court *de facto*. An objection to his authority may be made *before* the trial, or it will be disregarded. *Call vs. State*, 5 Ind. 1; *State vs. Arrone*, 2 Mott. & Mc. 27; *State vs. Alling*, 12 Ohio 16; *State vs. Carroll*, 38 Conn. 449; *State vs. Douglass*, 50 Mo. 593; *Freeman on Judgments*, Nos. 145-148; 22 An. 629; 26 An. 274; 28 An. 82; 32 An. 931.

In the case of *State vs. Carroll*, 38 Conn., to which reference is above made, and which is well considered and discussed, it was decided that, where it was provided by law that, in case of sickness or absence of a judge of a city court, a justice of the peace should be called in, to hold the court, as acting judge, during such temporary absence or sickness, and a justice was thus called in and acted, the judgments rendered by him are binding, whether the law under which the call was made, and the court held, was valid or not, because he was an officer *de facto*, if not *de jure*.

In *State vs. Douglass*, 50 Mo. 590, also referred to, it was held that where one acts as a *de facto* judge, under a law which invests him with authority, although it be unconstitutional, he is not an intruder, and his acts, done under color of office, must be taken to be valid. See, also, 38 Mo. 327; 49 Mo. 299; 24 Ill. 184.

We do not think that the Act of 1855, No. 255, which received judi-

Keough et al. vs. Foreman.

cial consideration in 31 An. 224, and which made it the duty of each of the District Judges of the District Courts of New Orleans to hold the court which any one of the other judges might have been incapacitated from holding, by reason of illness or leave of absence, has survived the constitutional provision which has abolished the system of courts previously in existence in the parish of Orleans, and which has substituted to it the present organization of *one* Civil District Court only.

That law died away with those courts, and is, therefore, no longer in being; the more so, as it is utterly incompatible with article 130, under consideration, which confers, as we have seen, exclusive control of a cause, throughout, to the judge to whom allotted and assigned, unless in specified cases, and, being inconsistent with the organic law, has become a lifeless form. Art. 259.

We therefore conclude that, as the relators have not seasonably objected to the trial of their case by the defendant judge, in the absence of the judge to whom it had been allotted and assigned, their complaint comes too late, and cannot be entertained.

By ruling as we do, in a case which is one *sui generis*, and of which we know of no precedent, we have placed upon the article of the Constitution under consideration a fair, logical, legal and practical construction, which vivifies and gives effect to language which was not frivolously inserted into it, and which otherwise would prove meaningless and cumbersome. It leaves the doors of justice open, in contingencies which have not been clearly provided against by any irritating clause, to *bona fide* litigants, desirous of a speedy adjustment of their differences.

Holding to the reverse, would be, perhaps, to overturn unnecessarily adjudications in matters of magnitude, and thereby occasion, possibly, great and irreparable damage, pecuniarily and morally, and to clog the administration of justice on technicalities which, if recognized, would be productive of no good and fruitful of considerable and even incalculable injury.

We are relieved from the necessity of considering other defenses urged by the defendant judge.

It is, therefore, ordered that the preliminary orders herein made be rescinded, and that the applications herein be refused, with costs.

No. 8425.

MARTIN KEOUGH, ET AL. VS. COLBERT W. FOREMAN.

In a suit to set aside a settlement of partnership, on the ground that the same was based on error, an appointment of auditors of accounts by the court is proper to determine whether there have been in the settlement such errors as alleged; and Defendant, in moving to homologate the report of the auditors, waives no right of maintaining the original settlement.

Keough et al. vs. Foreman.

A long settled account will not be opened and disturbed unless upon clear and positive evidence that the settlement was made in error of material facts or by fraud or undue influence.

If there were error in the settlement, but the same resulted from the gross negligence of the party complaining, he is not entitled to relief.

The fact that one of the parties to the settlement was addicted to drunkenness, will not invalidate the agreement, when it is not proved that the other party took advantage of a moment of intoxication.

Settlements are contracts.

A PPEAL from the Thirteenth Judicial District Court, parish of St. Landry. *Hudspeth, J.*

Transferred to New Orleans by consent of parties.

Lewis & Bro. for Plaintiffs and Appellants :

A motion to homologate the report of experts, binds the mover to its correctness.

It is a judicial admission which he cannot withdraw, after the other party has accepted the issue so tendered. *Gridley vs. Connor*, 4 An. 416; *Del Bondio vs. N. O. Mutual Insurance Association*, 28 An. 139; *Bender vs. Belknap*, 23 An. 764.

In an action of settlement of a partnership, the managing partner and cashier must be charged, in his cash account, for all moneys received for the firm and credited with all moneys paid out for the firm; and if it appears upon balancing the cash account that he has paid out more than he has received, the firm must reimburse him.

John E. King and *F. F. Perrodin* for Defendant and Appellee.

The opinion of the Court was delivered by

FENNER, J. The plaintiffs are heirs at law of Patrick Keough, who died in 1871. From 1867 to June, 1870, Patrick Keough was engaged in a planting and commercial partnership with the defendant, C. W. Foreman; Keough was the manager, bookkeeper and cashier of the commercial part of the business, which was that of a country store, while Foreman conducted the planting business.

Being desirous of dissolving and settling up their partnership, in 1870, each partner selected a friend, to act together, as experts, in posting the books, taking off a balance sheet, and making a statement of partnership assets and liabilities and of the accounts between the partners, as a basis for settlement. Keough chose Thos. J. Sloan, and Foreman chose C. C. Duson. These gentlemen received from the partners the books, memoranda and papers of the firm, and proceeded to post the books and ascertain the assets and liabilities. They consumed several weeks in their task, during which they had all needed conferences with the partners, and finally submitted the result of their labors to the parties. After a cursory examination of the experts' report, the partners agreed to accept it as correct, and proceeded immediately, on the very same day, to make a division in kind of the notes, accounts

Keough et al. vs. Foreman.

and other assets. There remained, under the settlement, a cash balance of about \$350, due by Keough to Foreman, which the former then and there paid in cash; and both parties expressed themselves satisfied with the settlement. Keough died in the year following, and up to the time of his death he and Foreman remained friends, and he never, directly or indirectly, intimated to Foreman any dissatisfaction with the settlement. After the settlement, the books and papers of the partnership remained in the possession of Keough, and, at his death, passed into the hands of his widow, who qualified as administratrix of his succession, and so remained until they were transferred to the heirs, the present plaintiffs, one of whom, Richard Keough, resided in the parish of St. Landry from about the time of Keough's death. After being in possession of these documents for seven or eight years, he and his co-heirs commenced proceedings to open this account only in 1878.

The first suit was brought simply for an account, which was resisted by Foreman on the ground of prior settlement. That suit was thereupon voluntarily discontinued, and the present action was brought to annul the settlement, on the ground of errors alleged specifically, and to have a new and corrected account taken, and praying for the appointment of auditors for that purpose. To this suit defendant filed an exception that plaintiffs were estopped from alleging that there had been a settlement by their judicial allegations in their former suit that there had been no settlement. The District Court sustained the exception; but on appeal this Court reversed the judgment and remanded the case.

Defendant then filed his answer, embracing a general denial, and then setting up specially that there had been a final settlement years ago, during the lifetime of the deceased, which was satisfactory to both parties; and, therefore, praying that plaintiffs' suit be dismissed.

The court, thereafter, in compliance with the prayer of plaintiffs' petition, appointed auditors "to examine the accounts of the firm of Keough & Foreman, and to state the same," etc.

These auditors, representing to the court that "their labors had been very arduous, extending through more than a month and embracing a number of complicated books and accounts, besides the examination of witnesses," presented their report, which exhibited a result not substantially different from the settlement which had been made between the parties themselves.

The defendant moved to homologate the report. Plaintiffs filed opposition to its homologation. The case was tried, and the District Judge found, as stated in his reasons, that the auditors' report was correct, and that "in its result it agrees substantially with the report of the experts who assisted in the settlement made by the partners in

Keough et al. vs. Foreman.

1870." He also found "from the said report, and from all the evidence, that the said settlement, made in 1870, was a final and definitive settlement between the partners, * * and that no errors had been shown to justify its disturbance." He, therefore, rendered judgment "that the auditors' report be homologated, that the said settlement, made in 1870, be recognized as final and definitive, and the suit be dismissed at plaintiffs' costs."

From this judgment the defendant appealed, and at our term of 1880 we remanded the cause for further proceedings, on the ground of certain rulings of the court excluding evidence offered by the plaintiffs, which we held to have been improperly excluded.

This lengthy recital of former proceedings herein has been given because plaintiffs strenuously contend that, by the effect thereof, both the defendant and the court are precluded from urging or considering objections to the opening of the original settlement, but must be confined to issues growing out of the auditors' report and the opposition thereto.

We cannot sustain the correctness of this position. This being an action to set aside an acknowledged settlement, on the ground of error, of course the defendant could not set up the settlement, by way of exception, in bar of the action. He was compelled to set up its finality and fairness, as he has done, as a special defense, in his answer. He went, with his general denial, to the merits, and was only to be determined upon the merits. He could not prevent the appointment of auditors by the court, nor the reception of evidence tending to establish the errors alleged. This was a proper order, in such a case—the object being two-fold, to determine whether there were such errors as justified the opening of the settlement, and, if so, to present the basis of a new account. When the auditors made their report, which substantially sustained the original settlement, at least in its result, defendant waived no right by moving to have it homologated, the effect of such homologation being to maintain the original settlement. Nor did we, in remanding the case, for the reception of evidence improperly excluded, conclude any right of any party to the cause on the final determination of the entire merits.

Such was the view taken by the District Judge, who concluded that the settlement made between the parties should not be disturbed, and rendered judgment dismissing the suit.

The following views, expressed by Chief Justice Marshall, command the ready assent of the legal mind :

"It is the right of every individual to exercise his own judgment on his own affairs, and to arrange them in such manner as his own will may dictate. Where this arrangement is made under the fair exercise

of judgment, without imposition, and with a requisite knowledge of the subject, it is certainly conclusive, unless the arrangement be in its nature alterable at the will of the person who has made it. It is a necessary consequence of this right, that an individual who has settled his accounts with another, and arranged the transactions between them, in a manner which receives the full and free assent of his mind, has a right to consider those transactions closed, and is consequently bound so to consider them. That which might before have been a matter of controversy, is adjusted by mutual consent; and claims which might have been uncertain, are reduced to certainty. It is no objection to this adjustment that some sacrifice may have been made. The party had a right to make the sacrifice. He had a right to balance in his own mind the advantages of the settlement against its disadvantages; and if, in his judgment, the former preponderated, no other individual has a right to say that he was mistaken, and that, therefore, transactions which he had closed shall remain open." *Brydie's Ex'r vs. Miller*, 1 Brock. 149.

Settlements are contracts, and they partake, in some measure, also of the nature of compromises. Like all other contracts, they may unquestionably be invalidated on the ground of error of fact. But what is error of fact? In the language of our Code, "that is called error of fact which proceeds either from ignorance of that which really exists, or from a mistaken belief in the existence of that which has none." C. C. Art. 1821.

To disturb a settlement of accounts, it is, therefore, not sufficient to show that debits were allowed which a party might perhaps have legally resisted, or that credits were excluded which might perhaps have been legally claimed. It is fundamentally necessary to show that the party complaining was ignorant of these facts, and that, if he had known them, his consent would have been withheld.

In this case, the party in whose behalf complaint is made, and also the friend whom he selected as his expert in the settlement, are both dead. Positive proof of ignorance is, therefore, impossible. If they were alive, it might be that they would prove such ignorance, but, as was said by Chief Justice Parker, in a like case, "for aught now to be known, if they were alive, they would discountenance any attempt to vacate the settlement made by them." *Farnam vs. Brooks*, 9 Pick. 237.

Doubtful, or even probable, testimony is not sufficient to open a long-settled account, in absence of proof of fraud or undue influence. *McIntyre vs. Warren*, 3 Abb. App. Dec. 99.

The proof must be such as to leave no doubt of the party's ignorance. Where the subject-matter of the settlement lay peculiarly within the knowledge of the party in whose behalf complaint is made; where he had better means of knowledge and of understanding the details

than any other person ; where the business to be settled had been managed exclusively by him ; where the books, accounts and papers which formed the basis of the settlement were all kept and written by himself ; and where, far from being deceived or imposed upon, he had, in these respects, every possible advantage over his co-partner, who was comparatively ignorant of the matters involved, it is fair to presume that he could not, without the grossest negligence, have been ignorant of the entire meaning and scope of the settlement, and that his assent to it was not given without a full understanding of it. *Facti ignorantia ita demum cuique non nocet, si non ei summa negligentia objiciatur.* Dig. lib. 22, til. 6, l. 9.

The converse is true that where the error could only result from the grossest negligence, the party must bear the consequences.

Such is the doctrine of English equity. "Though a court of equity will relieve against mistake, it will not assist a man whose condition is attributable to that want of due diligence which may be fairly expected from a reasonable person." Kerr on Fraud and Mistake, p. 407 ; 3 Jones Eq. 178.

Where the means of inquiry are equally open to both parties, if a mistake occur without any fraud or falsehood, no relief can be granted on account of mistake alone. Western vs. Babcock, 8 Met. 346 ; 1 Wood and Min. 138 ; 4 Md. Ch. 335 ; 5 R. I. 130 ; 8 Geo. 546 ; Kerr on F. and M. p. 434.

How much stronger the case where the party complaining had infinitely the best means of knowledge and of inquiry !

When the report of the experts, selected by himself and his co-partner, was presented to them, Patrick Keough either examined it or he did not. If he examined it, he was better qualified than any other person to understand it and to detect errors, and if he thereafter consented to settle by it, we must presume he did so with full knowledge and understanding of its contents. If, on the other hand, he agreed to settle without examining it, he was certainly guilty of the grossest negligence, which would preclude him from relief, in absence of any proof of fraud by either his co-partner or the experts. See numerous authorities, from both the Civil and Common law, quoted in argument in Hauer vs. Foster, 9 Pick. pp. 119, 120.

Under the evidence the most probable solution appears to be that both parties, having confidence in the experts, agreed, when the report was presented to them, to accept it and settle by it, without examination. If so, this amounted to a waiver of inquiry, which would preclude relief against error unaccompanied by fraud. Kerr on F. and M. p. 415.

In such a case, the waiver of inquiry by one party would be the consideration of the like waiver by the other.

In the instant case, every element concurs which, in the view of equity courts, influences against the opening of settlements, such as death of parties, lapse of time, absence of fraud, superior knowledge of subject-matter by party complaining, gross negligence, and waiver of inquiry. Extensive research has failed to discover any precedent for the opening of a settlement between parties situated as these parties were, and surrounded by so many circumstances tending to its support. See 2 Barb. N. Y. 586 ; 2 Strobb (S. C.) Eq. 250 ; 66 Mo. 603 ; 3 Brews. (Penn.) 270 ; Watson vs. Bank, 22 An. 14 ; White vs. Gaines, 27 An. 76.

Attempt is made to strengthen the case of plaintiffs by an attempt to prove that, at the time of the settlement, Patrick Keough was incapacitated, by the effects of hard drinking, from intelligently making the same.

No degree of physical or mental imbecility, which leaves the party's legal competency to act, is sufficient to avoid a contract or settlement with him. Farnam vs. Brooks, 9 Pick. 212.

Mere weakness of mind alone, in absence of imposition or fraud, forms no ground of avoidance. 1 Bland (Md.) 370 ; 2 Bush (Ky.) 598 ; 1 Treadw. (S. C.) 448 ; 3 Edw. (N. Y.) 36 ; 2 Ired. Eq. (N. C.) 456.

The fact that a man possessed of reason and the power of reflection, is frequently and even daily intoxicated, will not invalidate a contract by him, with a person who is not proved to have taken advantage of a period of intoxication. 2 Har. and J. (Md.) 421.

The evidence establishes that Keough was a hard drinker, but there is no sufficient proof that the habit had, at the date of this settlement, incapacitated him from attending to business, and it is fully proved that he was sober and in possession of all his faculties at the time of the settlement.

In conclusion, we would say that, even if some of the powerful objections to the annulling of this settlement were wanting, the errors complained of and the evidence in their support are of a character which leave our minds in grave doubt as to whether the settlement attacked may not have been, intrinsically, a just and fair one. The surcharges and falsifications claimed might well be explained or counterbalanced upon not unreasonable theories, as exhibited in the able opinion of the judge *a quo*.

Judgment affirmed at cost of appellants.

DISSENTING OPINION.

TODD, J. Having made a thorough examination of all the evidence bearing upon the partnership settlement of Keough & Foreman, and that evidence being the identical evidence which was before the experts

selected by the parties to make the settlement, and subsequently placed before the auditors, I am entirely satisfied that both the experts and auditors made serious mistakes to the prejudice of Keough in their respective reports. In point of fact, it is clear to my mind, as clear as an arithmetical calculation can make it, that at the dissolution of the partnership of Keough & Foreman, instead of Keough owing Foreman the amount or balance reported by the experts, Foreman was at the time indebted to Keough in a much larger sum. My conclusion on this point would not be so positive were it not that the same evidence—all the sources of information—were before me, and examined by me, upon which the previous investigations were had and reports made. I have commenced at the same starting point where the experts began, traveled with them over the same sources of investigation, and reviewed their methods and calculations, and have discovered their errors, some of which are, indeed, apparent on the very face of their report. Being firmly convinced, as a matter of fact, that the experts made serious mistakes, and presented to the parties an incorrect statement and a false balance touching their partnership affairs and liabilities, and that in accordance with such statement Keough paid to Foreman something that he really did not owe him, under the belief that the settlement was just and that he did owe the balance thus paid; in other words, being fully satisfied that the experts were in error in reporting a balance against Keough, and Keough equally in error in paying that incorrect balance, I cannot yield, in the face of such conviction of fact, to the legal propositions advanced in the majority opinion, by the effect of which, as construed, a court of justice is powerless to correct the error and right the party wronged by it, even under circumstances as viewed and detailed in that opinion. If Keough and Foreman had made the settlement themselves without the help or interposition of third persons, and in that settlement a grave error had been committed to the prejudice of either party, I cannot doubt but that the party injured would have the right to correct the error, and if he failed to do it in his lifetime, or even to discover it, that his right of action to do so would survive to his heirs or legal representatives. And I cannot see that it would make the slightest difference if, instead of making the settlement themselves, they accepted a false or erroneous plan of settlement prepared by others, and a plan false and erroneous through the mistakes and blunders of these agents. In both cases we must presume that the parties made or accepted the settlement, and carried it out under the honest belief that the settlement was just and correct. If that belief was unfounded, and the plan of settlement in truth was vicious and unjust, then, in either case, the act of making the settlement, or accepting that made by others, was done "from a mistaken belief in the existence of that which had

none," and thus fills literally the textual definition of error under the article of the Code quoted in the majority opinion—C. C. 1821. I fail to recognize the distinction between settlements made, even in the manner this was made, and other kinds of contracts, conventions and agreements. They are all equally subject to impeachment and attack on account of fraud or error, and equally vitiated by such causes. Nor do I see that confidence and absolute trust in the honesty and skill of those employed to make a partnership settlement and a prompt and ready acceptance of the plan of settlement growing out of such confidence, impairs or detracts from the right of a party injured by it to make complaint, nor can such acceptance, in my opinion, be reasonably styled negligence on the part of one possessing or exercising such faith and placing such reliance on others, and a negligence, too, so grave as to deprive a party of all right of action on the ground of error. The vital question after all, in all such matters, is, whether the error exists; and to me it seems of little import whether a party fell into that error from an excessive or blind confidence in his own judgment and skill, or in that of others employed by him. It does not seem to me sufficient cause for a charge of fault or negligence in either case, or in any manner affects the principle which invalidates agreements on account of error or impairs the right of action respecting the same. I believe all the above propositions are fully sustained by authority. C. C. 1881, 1882; 6 L. 204, 711; 9 R. 119; 11 An. 639; 1 Brock, 147; 3 Watts & S. (Pa.) 109; 18 N. Y. 285; 10 Humph. (Tenn) 238; 37 Ill., 512; 17 Ver. 615.

There is another circumstance, I must confess, that has had considerable weight with me on this point. I am satisfied from the evidence that, at the time this settlement was made and accepted, Keough from habitual drunkenness of long standing accompanied, at times, with attacks of *delirium tremens*, was utterly incapacitated from making an examination of the statement in the plan of settlement, or of the accounts on which it was based, or of giving an intelligent, legal or valid consent to the transaction. He was in my view of the evidence, a mental wreck at the time, and so remained until his death—though there was no design on the part of the defendant or the parties making the settlement to practice on his weakness. They were all alike in error. The papers prepared by the experts for this settlement, on the face of them, afford to my mind evidence of the incapacity of Keough in accepting them. A business man or an accountant—as Keough was claimed to be—might have easily discovered from an inspection of the papers, some at least, the gross errors they contained.

There is another view of this case which in my opinion renders the reasoning on the subject of the effect of this settlement and touching the right to reopen it—to which the majority opinion is mainly confined

—out of place, and unnecessary to a proper determination of the case. It is this : The suit is to annul a partnership settlement. The petition contained a prayer for the appointment of auditors. The court appointed the auditors, it must be presumed with the tacit consent of the defendant, as he did not oppose the appointment. The order of the judge, directing the duties of the auditors, did not confine them to a review or re-examination of the previous settlement to ascertain whether it was correct or not, but required them to investigate the account of the partnership and report a new settlement of the same as if the action was exclusively for the settlement of the partnership, as will be seen from the order, which is as follows :

“ Auditors be appointed to examine the accounts of Patrick Keough and Culbert W. Foreman with each other, and in connection with the firm of Keough & Foreman, and to state the accounts with precision and minuteness, so as to enable the Court to judge whether said auditors act properly in rejecting the articles in the account. It is further ordered that the books, papers, accounts, documents, in the said cause be placed in the possession of the said auditors, and C. C. Swayze having been chosen by plaintiffs, and Edward P. Veazie having been chosen by the defendants, are appointed as said auditors; and it is further ordered that P. J. Lefebvre be appointed to act as umpire, in case the two should not agree, * * * * * and that they make their report on or before the next term of court.”

No reference is made in that order to the previous settlement. It seems to me, if defendant or his counsel had entertained the views shown in the reasoning of the majority opinion regarding the immunity of the previous settlement, and its finality and conclusiveness from the facts attending it and so construed their rights with reference thereto, that they would have opposed any inquiry into the partnership accounts and insisted that the entire subject was closed and sealed by the previous settlement, and objected to the appointment of the auditors, and especially to the scope of the order defining their powers, and continued their opposition by objecting to the report when made or returned into court by the auditors. Instead of doing so, however, they tacitly acquiesced in the order as stated, and when the report was made, which really was, and purported to be, a settlement of the partnership, and in no manner based upon or even alluding to the previous settlement, so far from moving its rejection and standing on the old settlement attacked and insisting on an immunity for it, they moved the adoption of the report.

The plaintiffs filed their opposition to the report, and the entire proceeding and evidence in the lower court was confined and narrowed down to the correctness *vel non* of the report. Whatever might have

been the character of the action of the defence originally, they were supplanted and fixed by these subsequent acts and pleadings; and the question of the facts relating to this partnership and its settlement, raised in part by the acts and pleadings of the defendant, was thus thrust upon the court, which could only thereafter legitimately direct its attention to the ascertainment whether this auditors' report was correct or not. This really remained as the main, if not the sole, matter of inquiry under the pleadings, and was the real issue tried in the court below. I have devoted my attention assiduously to that inquiry, and would never have departed from it except to follow the tone of reasoning adopted by the majority opinion and the questions raised therein, and the result of it has confirmed me in the opinion above expressed, that Foreman was indebted to Keough, and not Keough to Foreman at the dissolution of the partnership. Of this I have not a doubt, and could state the amount of that indebtedness, but it is unnecessary. The auditors' report is, to some extent, free from the blunders made by the experts, but does contain some material errors which I think should be corrected, and which, if corrected, would show a considerable balance against the defendant instead of one in his favor. A simple inspection of the two reports of the experts and auditors, and of their different and even conflicting methods of computation and statements, should, in my opinion satisfy any one that the similarity of the result reached by each, argues nothing in favor of either, but must be set down as a mere accidental coincidence.

For these reasons, I am constrained to dissent from the conclusions reached by the majority of the Court.

No. 8415.**EMERANTHE LATIOLAIS, ADMINISTRATRIX, VS. THE CITIZENS' BANK OF LOUISIANA.**

- One contracting with a Corporation is thereafter estopped from denying its corporate existence, unless it is for causes that occurred since the contract.
- A mortgage creditor may treat as his debtor the vendee of the mortgaged property, who has assumed payment of the debt, without thereby creating a novation and discharging the original debtor. That discharge cannot be presumed, and must be established by clear and positive proof of such intention on the part of the creditor. In default of sufficient evidence to the contrary, it will be presumed that the creditor retained the old debtor at the same time that he accepted the new one.
- The notes furnished by a stockholder of the Citizens' Bank for the amount borrowed by him, are not prescribed so long as his Certificate of stock remains deposited and pledged to the Bank, under the provisions of its Charter.
- A mortgage granted by a stockholder of the same Bank, to secure the amount borrowed by him, needs not be re-inscribed.

Latiolais, Administratrix, vs. Citizens' Bank of Louisiana.

The said Bank may proceed by seizure and sale to collect the contributions due by a stockholder. Affirming 25 An. 628.

The sheriff, and not the seizing creditor, is answerable for damage suffered by property under seizure, when the latter is not charged with privity.

A PPEAL from the Twenty-first Judicial District Court, parish of St. Martin. *Fontelieu, J.*

Transferred to New Orleans by consent of parties.

Albert Voorhies, Martin Voorhies, Felix Voorhies and Edward Simon
for Plaintiff and Appellant :

First—Mortgages are prescribed by thirty years, with the exception of such as are specially excepted. Conventional mortgages are not excepted.

Second—Stock loan notes are prescribed by five years from the date they are exigible.

Third—Executory process cannot issue for the payment of stock contributions unless there be authentic evidence annexed to petition, showing that such contributions are due.

Fourth—The Acts of 1852 and 1853 are unconstitutional, at least so far as concerns stockholders of the Citizens' Bank who have not given their consent to these acts, which impair the obligations of their contract. Nor can they be enforced unless with the unanimous consent of all the stockholders.

Fifth—The pact *de non alienando* abandoned by the bank's recognition and ratification of the transfer of the plantation by Duclozel to Sproule.

Sixth—Novation by substitution of debtor,—the bank having accepted Sproule as her stock debtor and ratified the sale of the plantation and bank stock by Duclozel to Sproule.

Seventh—The plea of prescription can be filed at any stage of the cause, even on appeal, even in injunction cases and other conservatory remedies.

Eighth—The Acts of 1852 and 1853, besides, are unconstitutional *in toto*, because they violate the Constitution of 1845, Arts. 118 and 119, and the Constitution of 1852, Arts. 115 and 116—which require that "every law shall embrace but one object, and that shall be embraced in its title"—and which prohibit to amend, or revive, an act by reference to its title, requiring that the amended or revived act be re-enacted and published at length.

Robert S. Perry and Armand Pitot for Defendant and Appellee :

First—The mortgage prescribes in favor of a third possessor only when the hypothecary action prescribes, and the hypothecary action prescribes only with the right from which it springs. Pont, p. 1090, V. § 1243; Grenier, traité des Hypothèques, Vol. 2, No. 510; Trop- long, Vol. IV. p. 44; 3 An. 334; 5 An. 588; 8 An. 474; 20 An. 403.

Second—If at all, prescription begins to run in favor of a third possessor only after the transfer of the possession and the maturity of the mortgage debt. 15 An. 40.

Third—If a stock mortgage, independent of and isolated from its principal obligation be prescribed as to the loan note, it is prescribed as to the bonds and *vice versa*, but it cannot be prescribed as to the bonds.

Fourth—One who assumes payment of a stock note cannot, properly speaking, be considered a third possessor. Pont, Vol. 2, § 1187, 1249; 1 R. 135, 177; 6 R. 407; 16 An. 187; 25 An. 397.

Fifth—Prescription in favor of a third possessor is personal to him.

Sixth—The petition, in an injunction sued out under C. P. 738, cannot be amended before the Supreme Court so as to plead prescription. An amendment to such a petition must always be sworn to. C. P. 738, 304; 15 An. 40.

Seventh—An answer in such a proceeding does not change its nature unless judgment for the debt be prayed for. 16 L. 100; 19 L. 372; 2 An. 470; 3 An. 152; 22 An. 214.

Latiolais, Administratrix, vs. Citizens' Bank of Louisiana.

- Eighth—The pledge of stock is a continuing interruption of prescription as to the stock loan note. 22 An. 107, 117; 28 An. 125.
- Ninth—The Bank's officers can change its relations towards its debtors only in the manner its charter indicates.
- Tenth—Duclozel's debt has not been novated by acceptance of payments from his debtor. Institution of suit in a *stipulation pour autrui* does not discharge original debtor. Sec. 28, Bank charter; 4 An. 409; 11 An. 43.
- Eleventh—Section 24, of the Bank's charter, can be avoided only by compliance with Sec. 28.
- Twelfth—The same shares of stock cannot be represented by two stockholders.
- Thirteenth—The transfer of property and stock, as in this case, may constitute an equitable sale, as between vendor and vendee, but as to the bank it is a nullity. Secs. 24 and 28 of Charter; 1 An. 119; 4 An. 308. In such case the vendor remains a stockholder and debtor of the bank, and the vendee becomes simply a third possessor, and the property remains subject to Sec. 24.
- Fourteenth—The Citizens' Bank, in which the State is interested to the extent of several millions, should not be considered entirely as a private institution, nor the laws touching it as private laws.
- Fifteenth—Since the forfeiture, in 1842, the State Legislature has constantly recognized the Bank's corporate existence. 7 An. 286. Since the Act 141 of 1852, it has constantly treated and dealt with it as relieved from the forfeiture, and restored to the stockholders under original charter, and stockholders are estopped.
- Sixteenth—A stockholder, in whose favor the forfeiture was remitted, cannot, after having administered the bank for twenty-eight years, under the remitting law, deny that law's validity. A stockholder of the bank is an active participant in the bank's affairs. One who has participated in the business of even a corporation *de facto* is estopped. Secs. 9 and 17 of the Charter; 25 An. 228; Whipple vs. Parker, 29 Mich. 369; Swartout vs. Mich. Air Line R. R. Co. 24 Mich. 389.
- Seventeenth—That the bank was reconstituted by legislation of 1852, 1853, the case in 12 A. 228 is *stare decisis*.
- Eighteenth—Act 141 of 1852 antedates Constitution of 1852, and cannot be affected by it further than that Art. 121 of that Constitution ratifies and confirms it.
- Nineteenth—Where, in the petition for injunction, the violation of Art. 116 of the Constitution of 1852 is alleged as one of the grounds, the violation of no other article of that, or of any other Constitution, not pleaded, can be considered.
- Twentieth—The State had full control of the bank in liquidation, and was empowered to make any changes in its administration the public interests required. 7 An. 286. If we admit the unconstitutionality of Acts 141 and 246, the subsequent Legislature recognizing the present management would still be of force.
- Twenty-first—Insufficiency of evidence cannot be urged by way of injunction. H. p. 665, No. 2; p. 667, No. 31; p. 746, No. 45; 26 An. 709.
- Twenty-second—The bank has right to enforce payment of contributions and *via executiva*. 7 An. 289; 25 An. 625.
- Twenty-third—The forthcoming bond defeats the seizure and the control of the sheriff. 12 An. 617.
- Twenty-fourth—The seizing creditor is not responsible for damages resulting from illegal acts, or negligence of the sheriff. 11 An. 476; 14 An. 26; 32 An. 1181; 33 An. 338.
- Twenty-fifth—*Lis pendens* cannot be pleaded in executory proceedings. 28 An. 186.
- Twenty-sixth—It suffices that an order of discontinuance be entered on the minutes. It needs not a signed judgment. 14 L. 277.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an injunction suit, arresting an executory process issued by the Citizens' Bank for the balance of two reduced

stock mortgage notes, with interest, and of certain contributions, or calls, on reduced stock.

The plaintiff, in her capacity of administratrix of the succession of C. S. Duclozel, the original mortgageor and subscriber of the notes, has set up numerous defences in support of a prayer for complete exoneration from all liability, many of which were urged in the lower, and others in this court.

We understand that the object of the suit is to have it declared : *that* the Citizens' Bank is a defunct corporation, having no *status* in Court ; *that* the debt sued for has been novated,—a new debtor having been accepted in the place of the original one, who was discharged ; *that* the notes sued upon are prescribed ; *that* the mortgage claimed has no existence, for want of a reinscription ; *that* similar proceedings have been instituted against the delegated debtor, and are pending and undecided ; *that* the asserted pact *de non alienando* has been abandoned ; *that* the contributions demanded are not due and could not be recovered in the executory proceedings against the estate ; *that* the debt claimed, if it existed at the date of the proceedings against the delegated debtor, has become extinguished by a much larger debt due by the bank, which has since arisen, and which is pressed in reconvention.

The injunction was asked and granted, apparently under the sanctioning provisions of article 739 C. P.

The bank answered by a general denial on the trial. Bills of exceptions were taken, which will be hereafter noticed.

From a judgment dissolving the injunction, with a reserve in favor of plaintiff to claim the debt set up against the bank, in a different action, this appeal is taken. The bank has asked no amendment of the judgment.

The salient facts of the case are the following :

In 1837, C. S. Duclozel gave a mortgage, for \$15,000, *directly* to the Citizens' Bank, under the terms of its charter, for the triple purpose of securing : 1st. One hundred and fifty shares of its capital stock, subscribed for by him ; 2d. The bonds which the bank was authorized to issue to raise money to form its capital and to carry on its financial operations ; 3d. Loans made to him as a stockholder. The act was seasonably and duly recorded.

In 1869, Duclozel sold the property mortgaged and the stock secured by it to W. P. Sproule, who, as one of the terms of the sale, assumed the liabilities of his vendor to the bank. Sproule sold part of the property and stock to A. C. Graff and J. S. Chalfant, who assumed proportionally his liabilities to the bank.

In 1875, in consequence of non-payment of its debt, under the terms of agreement, and under charges of indebtedness *against Duclozel*, styl-

Latiolais, Administratrix, vs. Citizens' Bank of Louisiana.

ing Sproule, Graff and Chalfant "owners and third possessors," the bank issued executory process against the mortgaged property, which at once passed into the sheriff's possession and custody. Duclozel was not made a party. Sproule was served with the process of the court, while the other two, who were absent, were represented by a curator *ad hoc*. Subsequently, the property, on bond, was released from seizure and an application was made for the removal of the case to the United States Circuit Court. The bank discontinued the proceeding.

It appears from the evidence received, subject to exceptions, that, while the property was under seizure, and after it was bonded, it sustained material injury in different ways, which the plaintiff values at \$20,000, for which indemnity is asked.

After the discontinuance mentioned, the bank instituted these proceedings,—Duclozel having departed this life,—against his succession, represented by the plaintiff as administratrix. She sued out the present injunction.

From the view which we have taken of the case, we deem it unnecessary to pass either upon the consequences of the joining of issue by a general denial by the bank, or upon the bills of exception taken during the trial. We propose to deal with the case as though it had been brought *via ordinaria* and tried accordingly. Had the bank prayed for amendment the contention would now be set at rest.

We will now proceed to examine *seriatim* the different grounds of objection or opposition, upon which the plaintiff relies for relief.

The plaintiff is estopped from denying that :

I. The bank had and has a legal *status*. C. S. Duclozel was the original stockholder, the original mortgageor, the original borrower. By becoming a contracting party in the Act of 1837, he acknowledged the existence of the bank. By that act he subscribed for its stock, gave security for borrowing its money. He secured the stock and the loan, as well as the bonds issuable by the bank, by mortgage on his property.

In 1869, more than thirty years afterwards, he sold the stock which he had acquired in that bank, together with the property which he had incumbered, as is above said, and had the purchaser, as one of the conditions *sine qua non* of the sale, to assume all his liabilities, actual and eventual, to the bank. By those acts he not only acknowledged the existence of the corporation with which he had contracted, but he *warranted* that very existence.

In the petition which the plaintiff, as administratrix of his succession, has filed for an injunction, the bank is declared to be a corporation, located in New Orleans, and prayer is made that it be *enjoined*, *cited* and *condemned* to pay damages fixed at \$20,000.

All the reasons set forth in the petition, in the oral and written ar-

guments, to show that the bank is a myth and has no *status*, existed, to the knowledge of Duclozel, prior to and in 1869, when he acknowledged and warranted the existence of that institution, in the sale which he made to Sproule of his stock therein and of his property mortgaged to it, and when he imposed upon his vendee the assumption of all his confessed debts and liabilities, present and contingent, to the corporation.

It is settled, by an overwhelming array of indisputable precedents, that, as a rule, one who contracts with what he acknowledges to be and treats as a corporation, incurring obligations in its favor, is estopped from denying its corporate existence, particularly when the obligations are sought to be enforced. It is right that it should be so. If a party have no other objection to oppose to the enforcement of the contract than that the obligee is incompetent to sue, for reasons *anterior* to his contract, or last acknowledgment, he should not be permitted to escape liability. The case would be different where the incompetency is the result of something happening subsequent to the contract, or last acknowledgment of existence and capacity. It is a familiar principle that one cannot be permitted to play fast and loose, so as to take advantage of his own unfair vacillations.

We think it useless trouble to refer to the authorities, which, however, we have taken the pain of reviewing.

How can the plaintiff consistently ask this Court to pronounce that the bank has no *status*, is incompetent to sue for the enforcement of contracts in its favor, for want of a charter, when during the thirty odd years which elapsed since Duclozel first contracted with it he has uninterruptedly recognized it as a *going* corporation; and when, during the thirty-nine years which have elapsed since the great law of relief was passed in its favor in order to assist it and its stockholders and others concerned in its welfare and prosperity, the State of Louisiana, whose creature it is, from whom it emanates,—and which perhaps alone, could have taken advantage of any irregularity destructive of its being,—has, by at least *thirteen* statutes, adopted from time to time, up to 1880, continually recognized, proclaimed and acted upon the fact of its existence.

If the doctrine of estoppel can be opposed to a party blowing hot and cold, it is assuredly in the present instance.

II. There has been no novation of the debt or mortgage. The act of mortgage executed in 1837 is emphatic that Duclozel shall continue to be liable and the mortgage shall remain in its integrity, until the debt shall have been paid or until he shall have been discharged. The clauses and stipulations of that act were tacitly reiterated and recognized as in existence and obligatory in the act of sale, in 1869, by Du-

clozel to Sproule, which contained stipulations *pour autrui*, of which it was legitimate for the bank to avail itself, not only on general principle, but also by the tenor of the act of 1837, which is admitted by the petition for an injunction and by counsel, in their brief, to contain the pact *de non alienando*, and by the express terms of its charter, which authorize it to ignore subsequent transfers.

There is nothing in the record to prove that the bank has done any act showing that it considered and treated Sproule, Graff and Chalfant as its sole debtors, in consequence of its having discharged Duclozel, or otherwise: the notices issued by a clerk of the bank are in no way indicative of such acknowledgment.

But the plaintiff insists that in its petition in the proceedings first brought the bank ratified the sale made by Duclozel to Sproule, and by the latter to the other parties, in treating them as *owners*. Be that so, but it does not follow, in the absence of either a formal and express or of an implied consent to novate, which should be irresistibly inferred from surrounding circumstances, that it has discharged Duclozel unconditionally, and has accepted those parties as new delegated debtors in his place. *Nemo presumitur donare*. 29 An. 958; 19 An. 212.

Novation is a contract, the object of which is: either to extinguish an existing obligation and to substitute a new one in its place; or to discharge an old debtor and substitute a new one to him; or to substitute a new creditor to an old creditor with regard to whom the debtor is discharged.

It is never presumed. The intention must clearly result from the terms of the agreement or by a full discharge of the original debt. Novation by the substitution of a new debtor can take place without the consent of the debtor, but the delegation does not operate a novation, unless the creditor has *expressly* declared that he intends to discharge the delegating debtor, and the delegating debtor was not in open failure or insolvency at the time. The mere indication by a debtor of a person who is to pay in his place does not operate a novation. *Delegatus debitor est odiosus in lege*. R. C. C. 2188, 2189, 2190, 2192.

The most that could be inferred would be that the bank in the exercise of a sound discretion, proposed to better its condition by accepting an additional debtor to be and remain bound with the original one. The bank had something to lose by discharging Duclozel, but had something to make by accepting Sproule and the others. The testimony shows that the account of the bank with Duclozel was not closed, and that what amounts were paid in after 1869, were placed to the credit of his account.

Commenting upon article 1273 of the N. C., Marcadé says, vol. 4, III, § 769:

"On conçoit en effet, que quand une nouvelle personne, soit de son propre mouvement, soit sur la présentation de mon débiteur, s'oblige envers moi, au paiement de ma créance, il est sans doute possible que ce débiteur soit pris par moi, à la place de l'ancien qui sera ainsi libéré par la novation, mais il est bien possible aussi que mon intention soit de l'avoir pour obligé en même temps que l'ancien débiteur. Ici encore, d'après notre article, les doutes qui existeraient sur le point de savoir si on a entendu faire une novation, entraîne négation de novation, puisqu'il faut que cette novation soit clairement établie."

Larombière, V. 3, on Art. 1275, says: "Lorsque le débiteur déléguant n'a pas été expressément déchargé par le créancier délégataire contre qui, dans ce cas, il n'y a pas novation, ce dernier s'il n'est pas payé par le délégué, aura un recours à exercer contre le déléguant. Celui-ci continue, en effet, d'être l'obligé nonobstant l'accession du nouveau débiteur qui a accepté la délégation. Il doit en conséquence payer la dette si le délégué pour lequel il est censé répondre ne la paye pas lui-même."

Le créancier qui n'a point déchargé le débiteur retire ainsi de la délégation faite à son profit l'avantage de conserver ses droits contre le déléguant en même temps qu'il en acquiert d'autres contre le délégué. Et ces nouveaux droits il les fera valoir avec toutes les garanties qui peuvent y être spécialement attachées, soit que déjà elles aient existé à l'égard du déléguant, soit qu'elles aient été stipulées du délégué au moment de la délégation."

V. also *Laurent v. 18*, p. 339, n. 315.

See, also, *Pothier, Obl. 3 part, ch. 2, No 559, 560; Merli, v. ind. de paiement; Toullier 7, No. 278, 283; Gilbert, C. A. on same article and article 275; Duranton, 12, n. 309, Zachariæ, t. 2, 323.*

The authorities in 19 L. 207 and 1 R. 30, do not bear out plaintiff's theory. In the first case there was a special condition that the notes were discharged and were to be delivered and destroyed before the first payment under the act should be due. A suit, on the *assumpsit*, by the creditor against the new delegated debtor gave effect to the act in all its parts. In 11 A. 93, the ruling in the second case was declared, and we think properly, to be of doubtful authority.

In *Jacobs vs. Calderwood*, 4 An. 509, which was a suit against an original debtor for the difference between the proceeds of his mortgaged property and the amount of the debt, he pleaded *novation*, resulting from a suit on the *assumpsit* of a substituted debtor and recovery against him in a personal action of a judgment for the deficiency. The Court held that the delegation and the acceptance by the creditor of the *stipulation pour autrui*, did not operate a novation and did not discharge the original debtor. The ruling in 1 R. 301, was found not applicable in

that case; neither is it in the present instance. See, also, 9 M. 270; 16 L. 474; 13 A. 238.

We cannot declare, in the face of the charter of the bank, of the original act of 1837, of the formal text of the law and of the judicial exposition made of its object and purport, that the bank has accepted Sproule and the others in the place of Duclozel, and has discharged him.

III. The notes sued on are not prescribed.

The eleventh section of the charter of the bank entitles a stockholder, on depositing and pledging his certificate of stock, to a credit of one-half of the total amount of that stock; such stockholder, on using such credit, to give his notes for the sum thus lent him.

It is manifest that the notes sued on in this case evidence the use which, under the charter, Duclozel made of his credit. He impliedly contracted with the bank, on obtaining the money which forms the consideration of those notes, to give his stock in pledge, the certificates wherefor the bank retained.

The stock pledged as a security, constitutes a standing acknowledgment, during the existence of which prescription did not run. The debtor consenting to the possession of his property by his creditor, tacitly acknowledges the existence of the debt. This defense is not a new one. Whenever set up in similar cases it has invariably been properly overruled. 21 An. 128; 1 R. 556; 8 R. 146; 22 An. 108, 117; 28 An. 125; O. B. 44, fol. 376; O. B. 45, fol. 138; O. B. 46, fol. 337, 372. It must have the same fate in the present instance.

IV. The act of mortgage required no reinscription to keep the mortgage alive.

Under the special and exceptional laws which have been enacted for the benefit of this bank, and from the beginning have always received a liberal construction, although in derogation of common right,—it does not lie in the mouth of an original stockholder and mortgageor, to plead against the bank a want of reinscription.

Whatever can be said under article 3369 R. C. C. (3333) touching the cessation of the effect of an ordinary mortgage between the parties, can have no bearing in this case, which is entirely *dehors* the purview of that general provision.

The Citizens' Bank, being a property bank, is entitled to all the immunities which the law allows to such institutions, under which mortgages consented in their favor are dispensed from reinscription. Such mortgages, when once inscribed, remain in force, as long as the principal (the debt) which they are designed to secure, continue in existence, unsatisfied, unextinguished, or until a discharge has been actually

granted. It is not until after extinction of the debt, or after a discharge that the mortgage dies away.

Under the very terms of the Act of 1837, reiterated in that of 1869, such was, besides, the express understanding of the parties, and that understanding being the law regulating their respective rights and obligations, concludes them. C. C. 3284, 3285, 3411.

In *Union Bank vs. Dawson*, 7 An. 548, it was expressly held, that a mortgage given directly to a property bank need not be reinscribed in order to continue in force, after an original inscription.

The interest of the State in the property banks induced Acts of March 11th, 1842, No. 96, and 27th March, 1843, No. 87, which, without referring to article 3333 of the Code of 1825, have amended it, the former exempting from reinscription stock mortgages in favor of those banks, and the latter forbidding the cancellation, after ten years, of any mortgage of that description.

This double legislation, it has been held, although exceptional, is not to be construed strictly, and is to be taken together, the latter enlarging the former. The courts have gone to the extent of saying that all mortgages, not merely stock mortgages, but others, owned by a property bank, are within the statute, whether such mortgages be granted directly or acquired by subrogation. 4 An. 471; 10 An. 591; 15 An. 630.

The rulings dispensing with a reinscription in cases like that now before the Court, have become a rule of property which cannot be questioned or disturbed.

V. The proceedings instituted by the bank to seize the mortgage property in the hands of Sproule and the others, cannot be pleaded as *lis pendens*. Duclozel had not been made a party to them. They were discontinued previous to the institution of the present ones. The objection that the order of discontinuance on the minutes is unsigned is untenable. 14 L. 277; 12 An. 642; 28 An. 186.

VI. The pact *de non alienando* was not abandoned.

On the contrary, it was carried out by the proceedings against Sproule and the others. Admitting that it was, however, what is it to the plaintiff, who is the administratrix of the succession of the original mortgageor, whether it ever existed at all? It can, under no circumstance, be insisted upon as a ground to arrest the writ of seizure and sale, or seek exoneration from the debt, or mortgage.

VII. The bank had a right to claim the contributions, under the act on the subject. The question whether there was sufficient authentic evidence to justify the *fiat* of the District Judge, should have been presented on appeal and not on a petition for an injunction. H. D. 665 No. 2; 667 No. 31; 746 No. 45; L. D. 312 No. 10; 26 A. 709. Be that

as it may, however, we think under the authority in the case of the Citizens' Bank vs. Deynoodt, 25 A 628, the decree of seizure and sale was properly made. V. Act 141 of 1852, Sec. 4 ; Act 246 of 1853, Sec. 1 ; Act 45 of 1873 ; also 28 An. 125; 7 An. 289.

VIII. The damages claimed should not be recovered. The plaintiff shows herself that ever since 1869 Duclozel has ceased to own the property ordered to be seized and sold. If it sustained injury for which the bank might be made responsible, the question would arise whether it could be so held, otherwise than in an action by the owners of it. They are not before us.

If it be true, however, that the plaintiff can officially, as a creditor of theirs, with vendor's privilege and special mortgage, be permitted to champion for the benefit of the estate which she administers, assert and vindicate the right of such owners,—no recovery should be had. The right of action if it exist, could be exercised, not against the bank which is not charged with *privity*, but against the sheriff, if the damages were occasioned while the property was in his keeping and custody, and by his negligence and fault. This right of action would not exist for injury or damage sustained subsequent to the bonding of the property and its consequent release from seizure. 14 An. 26 ; 11 An. 476 ; 12 An. 616 ; 32 An. 1181 ; 33 An. 338.

The District Court erred in reserving to plaintiff the right of claiming damages in a different action.

The bank pleaded the general issue. If it did not intend to try the suit as to the item of damages, it should have excepted to the proceeding in that respect. The plea would have been sustained, as such a claim cannot be validly incorporated in an opposition for an injunction, without bond, under article 739 C. P. See, also, 738.

The appellant has prayed for the reversal of the judgment of the lower court and for the damages claimed. We have found against her in the positions which she has taken. In the absence of a prayer for an amendment of the judgment on the part of appellee, we are bound to let it remain undisturbed, although we find it incorrect in one particular.

It is, therefore, ordered and decreed that the judgment appealed from be affirmed with costs.

Allen, Nugent & Co. vs. Cary et als.

No. 7960.

ALLEN, NUGENT & CO., vs. G. W. CARY ET ALS.

One partner cannot, without the assent of his co-partners, bind the firm for his individual debt or that of a third person.

Where a partner, acting *apparently* beyond the limits of his authority, untruly states his co-partners' consent, his representations will not bind them, even in favor of parties dealing with him in good faith.

It is the duty of every one who deals with a member of a commercial partnership *out of the line of business* of such partnership, to require evidence of that partner's special authority to bind his co-partners,—and this at the risk and peril of said party.

APPPEAL from the Third District Court for the parish of Orleans.
Monroe, J.

W. S. Benedict for Plaintiffs and Appellees

First—The holder of a promissory note of a commercial firm, who has acquired same for value, in due course of business, before maturity, is entitled to recover against said firm, and the members thereof, *in solido*.

Second—Where no suspicious circumstances are shown, due inquiry is made, and the holder has acted in good faith and given value, he is entitled to recover. 2 Wallace, 110; 26 Annual, 15.

Third—The holder is not required to see that each of the members of the firm signed the firm name to the note. C. C. 2870.

Fourth—The discount of commercial paper is usual in commercial firms.

Fifth—The fact that an accessory contract was entered into, in due course of the business, does not alter the relations of the parties.

Sixth—The date of a note is immaterial, and all that need be looked at, when same is offered for sale or discount, is the maturity thereof, at some subsequent date to the transaction. Daniel on Negotiable Instruments, section 83; Byles on Bills, 166; Edwards on Bills, 150; Bayley on Bills, 21; Story on Bills, 37.

Seventh—Where the firm, makers of a note, received the proceeds thereof, the firm will be considered as ratifying the Act, and all the members of the firm, even if the Act be done out of the course of its business, will be bound. Daniels on Negotiable Instruments, section 359; 4th Metcalf, 577; 18 Penn. 408; 16 Wend. 505.

Eighth—The firm is bound for the debts contracted in its name, even when they did not turn to its advantage, unless by the nature of the contract, it should appear that it had nothing to do with the affairs of the partnership. 11 Martin, 427; 4 Robinson, 193.

Ninth—Where the person dealing with a member of the firm, has no knowledge that the partner is making a contract in violation of his duties, and the person trading with him is in good faith, and the credit is given to the firm, and within the scope and objects of the firm receiving the proceeds of the transaction, the firm and members thereof are bound. 22 How. 266.

Tenth—A misapplication of the funds obtained for the partnership by one partner, does not affect the right of the party trading with such partner as against the firm. 5 Peters, 529.

Miller, Finney & Miller on the same side.

John A. Campbell for Defendant and Appellant:

First—The defendant, Richardson, denies liability upon the contract and endorsements contained in the record and described in the petition. He did not sign either paper. Neither paper was made by his partner in the course of the business nor within the range of the authority conferred upon a partner.

Allen, Nugent & Co. vs. Cary et als.

These facts appear on the face of the papers and from the testimony. The notes were signed for C. W. Cary by George W. Cary. They are dated in Alabama six months before any firm of Richardson & Cary existed. C. W. Cary had no account with and owed no debt to the firm, and his notes were not their property. They were drawn and endorsed to the plaintiffs as evidence of advances made to the maker at the time, and which were to be paid by him, with commissions, discount, interest and charges in addition, by the shipment of six hundred and fifty bales of cotton at different dates. The endorsement and guaranty were designed to assure and secure this contract and these extra profits. This appellant was never consulted upon the contract, nor has he approved or consented to it, and avers that it was not in the course of the business of the firm. *Backelder vs. Rogers*, 12 Peters, 221; *Kendall vs. Wood*, L. R. VI. Exch. 243; *Brettell vs. Williams*, 4 Ex. 243; *Leveson vs. Lane*, 13 C. B. N. S. 278; *Maulden vs. Bank*, 2 Ala., 502; *Levin vs. Carter*, 3 Ired. 238; *Leckie vs. Scott*, 10 La. 412; *Satterfield vs. Compton*; 6 Rob. 120; *Catskill Bk. vs. Stall*, 48 Wend. 466; *Bedarride des Soc.* No. 159; 40 Dalloz, Jr. G. Société, No 927; *Pothier on Part.* § 101; *Call on Part.* 401, 478; *Story on Part.* §§ 121-13.

Second—The partnership articles prohibit the issue of the partnership name in any manner outside of the business of the firm, as dry goods merchants. Nor is there authority of law for one partner in such a firm to issue the paper of the firm or its signature on the notes of other persons as surety, guarantor, or for their accommodation. The assent of each partner to the issue of such paper is essential to charge such partner. His co-partner has no authority to do the act, nor can his oral statements be evidence of such authority. Authority must be proved as a fact in the cause by evidence of assent at the time or ratification after. The burden of proof of this fact of an original authority or a subsequent ratification rest upon the plaintiffs.

The act is ultra vires and void, without a specific authority from the partners not signing. *Brettell vs. Williams*, 4 Exch. 622.

The rule is, if a partner acting apparently beyond the limits of his authority, untruly represents that he is acting with his co-partners's consent, they are not bound by his representation, nor are they liable for what may be done on the faith of it. *Lavery vs. Burr*, 1 Wend. 529; *Foot vs. Sabin*, 19 John 157; *Ex Parte Agace*, 2 Cox, 312; 3 Kent's Comm., Sect. 43, p; 1 *Call on Part.* § 459, 6 Ed; *Hendren vs. Bercowitz*, 37 Calif. 113.

Third—It does fully appear that the appellant did not consent to this contract and was ignorant of its existence while the firm continued. The firm had never made a contract like this, nor had obtained loans from banks, from insurance companies, brokers or factors. They had not issued a note.

The contract in so far as the appellant is concerned, is extraordinary and unusual. Scarcely a parallel has existed in the memory of merchants who testified in the suit: *R.* 117, 108, 107, 100, 96, 88, 91.

Fourth—The notes offered are sealed notes purporting to be made by a resident of Montevallo, Shelby county, Alabama, and this fact was known to the plaintiffs in the suit. There was no change of residence of the maker at the time of their maturity. There was no presentment made to the maker, nor demand of payment of the maker, at his domicile or personally, at their maturity. And so the plaintiff has not established the facts to warrant a suit or recovery on such paper. 2 *Mart.* 183; 7 *M.* 364; 10 *M.* 18; 4 *N. S.* 186; 10 *A.* 107, 394, 783.

Fifth—The entire contract as embodied in the cotton contract drawn by the appellees, and containing a full description of the obligations of C. W. Cary, as a consequent of advances made to him, to be reimbursed by shipments of cotton to be disposed of in the course of the factorage business, so as to obtain the profits to arise, cannot be altered or varied by parol evidence. The appellees cannot by their parol testimony change a guarantor into a principal, nor superadd to the contract clauses or conditions not stated in it. On the face of the papers there was full and intelligible evidence, that the firm of Richardson & Cary, as represented by Cary, was engaged in business foreign to that of their articles of

partnership, and the scope of a dry goods business. It was a legal duty of the appellees to ascertain from this defendant whether he consented to it. Cary had no authority by law, nor by the articles of partnership to act for him. Cases before cited under 1 and 2.

Bayne and Renshaw on the same side.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an action to hold John P. Richardson, as one of the partners composing the firm of Richardson & Cary, liable for the obligations of C. W. Cary as *drawer* of three notes, aggregating \$7013 97, and as *obligor* under a contract by which he bound himself to the plaintiffs to make to them shipments of cotton, the proceeds to be applied to the payment of the notes, commissions and eventually attorney's fees in case of breach of contract. The liability is sought to be imposed on the grounds that the notes were endorsed by Richardson & Cary, and the fulfillment of the contract engagements was guaranteed by them.

G. W. Cary made no defense. Richardson denies liability. He admits that the name of the firm was endorsed on the notes and put to the guarantee, on the contract; but avers that it was so used by G. W. Cary, his partner, out of the course of the business of the firm, beyond the range of his authority as partner, in matters disconnected with the affairs of the partnership, without any authority; to plaintiffs' knowledge; that no consideration was received by the firm, or enured to its benefits, as plaintiffs knew or should have known.

There was judgment in favor of plaintiffs, allowing the amount of the notes, but rejecting the remainder of the claim.

From the judgment against him Richardson has appealed. In their answer to the appeal the plaintiffs ask that the judgment be amended so as to be allowed their entire demand.

The differences of the parties have to be determined particularly and almost exclusively, on the facts as they are shown to have occurred on the 23d of June, 1879.

The evidence first shows that, on the 12th of March, 1879, the formation of a partnership between John P. Richardson and G. W. Cary, was announced in the papers, under the firm name and style of Richardson & Cary, for the purpose of doing a general dry goods and notion business at No. 31 Magazine street, in this city; the notice bearing the names of both partners.

The record next establishes that on the 23d of June, 1879, a contract, evidenced in writing, was entered into between one C. W. Cary of Alabama, with the plaintiffs, whereby he acknowledged his indebtedness to them in the sum of \$7013 97, for advances made and to be made to him to carry on his business and planting interest, during the year 1879,

Allen, Nugent & Co. vs. Cary-et als.

as evidenced by his three notes (which are described in the petition); and whereby he stipulated that, in order to reimburse said advances, he would, during the years 1879 and 1880, make shipments of cotton to the plaintiffs, and, in case of failure, he would incur and make good, certain pains and penalties specified in the deed, which concludes saying that: "It is well understood that, without the special agreements hereinbefore recited, to properly conduct their business relations, the said Allen, Nugent & Co. would not have entered into this contract."

This instrument is signed "C. W. Cary, by G. W. Cary," and bears the following stipulation :

"We hereby guarantee the prompt fulfillment of the above contract,
(Signed) "RICHARDSON & CARY."

The only witness who testified as to the occurrences of the 23d June, 1879, surrounding the drawing up and signature of the contract and the endorsement of the notes described in it, which are those sued on, is Mr. Lallande, one of the plaintiffs.

As we understand his testimony, it is to the effect that his firm was applied to early in June, 1879, by G. W. Cary, a partner in the firm of Richardson & Cary, for a loan of money for the wants of the partnership, which was refused, their business being a cotton factorage and the charges in the same and their advances being only made to parties dealing with them in that line.

On the 23d of June, following, some ten days later, it appears that Cary returned to plaintiffs' countingroom and stated that his firm had to remit to a great many parties, particularly to *one* who could influence a thousand bales of cotton, and that he was ready to accept the loan on plaintiffs' terms (which are detailed.) He was then handed a blank cotton contract and told to read it carefully; which he did. Under the pretence of going to see Mr. Richardson, his partner, he left the office, came back in about half an hour and said that Mr. Richardson thought the terms pretty tight, but that they would accept them. The blank was filled by the witness. G. W. Cary signed it for C. W. Cary in presence of the witness. He then, simultaneously, endorsed the notes, and signed the warrants on the contract in the name of Richardson & Cary, and passed them to plaintiffs through the witness. Thereupon, the plaintiffs delivered to G. W. Cary their check on the Canal Bank, to the order of Richardson & Cary, for \$6550 27, which, upon being endorsed by G. W. Cary in the name of the firm, was collected by him.

The liability sought to be fastened upon Richardson depends upon the construction to be placed upon the contract, the notes and the testimony referred to. It cannot be affected by occurrences which took place previously or subsequently and which do not prove knowledge, consent or ratification by J. P. Richardson.

It is clear to our minds, that the doings of G. W. Cary, on the occasion, can only be viewed as the acts of a partner using the partnership name and credit to secure the obligations of a third party, to the direct, immediate knowledge of the other contracting party, however in good faith and shamefully deluded.

The contract, the guarantee, the notes, the testimony of Mr. Lalande, are all in evidence by the plaintiffs and conclude them.

They cannot pretend that the contract does not say that the advances were not made to C. W. Cary; that he was not their debtor; that he was not a third party; that Richardson & Cary were not sureties on the notes and on the contract, to the end that *his* liabilities to them, to that extent, would be faithfully met. The fact that the check was made to the order of Richardson & Cary, does not show that the consideration of the notes was given to them for their benefit and enured to their advantage; for, the only capacities in which they can be deemed to have acted in, with reference to the matters, are those of merchants of C. W. Cary, for whose account they had negotiated, and of securities of his engagements as set forth in the contract and the notes mentioned in it.

The plaintiffs cannot say that they did not know that the partnership between Richardson & Cary was not in existence at the dates of the notes, which appear to have been issued some six months prior to the announcement of the formation of the partnership in the city papers on the 12th of March, 1879. If the partnership was not in existence at the date of the notes, how could they have been properly made to the order of Richardson & Cary? This was a circumstance well calculated to arouse suspicion and to put plaintiffs on their guard and on inquiry.

It is shown that they prudently and safely inquired into the financial condition of the firm. Informed by the unusual character of the last approach, of the offers and doings of Cary, it would have been quite easy for them to have proceeded to 31 Magazine street, the place of business of the concern, and there ascertained from the only other partner, Mr. Richardson, whether Cary had his assent for the proposed use of the name of the firm for the *guarantee* of the obligations of W. C. Cary, the alleged drawer of the notes and obligor on the contract mentioning the notes.

It is the duty of every one who deals with a member of a commercial partnership who apparently transcends his mandates and powers, to require evidence of his authority to bind his co-partners, and this at his risk and peril.

The plaintiffs cannot say that they were authorized, under the circumstances, to believe with certainty of correctness, that G. W. Cary was acting in the course of the business of the partnership within the

Allen, Nugent & Co. vs. Cary et als.

range of his powers as partner, in a matter connected with the affairs of the partnership, or with the authority of the other partner, for, the notice of the formation of the partnership published in the papers, as said and proved, distinctly announced that the partnership was formed "*for the purpose of doing a general dry goods and notion business*" and gave the address of the place where the business was to be carried on that third parties might be better informed.

The acts and doings of G. W. Cary, in the name of the firm of Richardson & Cary, could not be considered as accomplished for the purpose of doing a general dry goods and notion business. The transaction was unusual. It would have been easy for the plaintiff to have inquired. It was their duty to have done so. For their omission, in the matter, John P. Richardson cannot be made gratuitously to suffer.

There is no evidence that the amount of the check was received by and enured to the benefit of the firm. Testimony was adduced to the contrary. Neither is it proved that Mr. Richardson either knew of the transactions, consented thereto, or ratified the same.

The authorities relied upon by the plaintiffs are undoubtedly correct, but they can afford no relief in a case like the one at bar to the plaintiffs. 2 Wall. 110; Daniel, N. J. 83, 359; Byles on Bills, 166; Edwards, 150; Bayley, 21; Story, 37; 11 M. 427; 4 Rob. 193; 22 How, 266; 5 Pet. 529; 4 Metc. 577; 18 Penn. 408; 16 Wend. 505.

The rule of law is that, where a partner, acting apparently beyond the limits of his authority, untruly states his partner's consent, his representations will not bind them, even in favor of parties who may have acted in good faith. 12 Pet. 221; 3 Kent Com. Sec. 43; 4 Exch. 622; 1 Wend. 529; ex parte Agare, 2 Cox, 312; 37 Cal. 113; 10 An. 107, 783, 394; 2 Mart. 183; 7 M. 364; 10 M. 18.

The rule of law is also that one partner cannot without the assent of his co-partners, give a security, in the partnership name, for the payment of his individual debt; nor can he, without such assent, lend the name of the firm as surety, endorser or guarantor for a third person. 2 Ala. 502; 1 Ala. 565; 12 Peters, 221; 4 Ech. 623; Parsons, vol. 1, p. 184, 221, 228; Story, Sec. 128; Chitty, 48; 6 B. Monroe, 60; 4 Wend. 168; Daniels, 1, p. 276; Collyer, 490; 28 An. 941. See, also, Mechanics' and Traders' Co. vs. Richardson & Cary; Mut'l N. B. vs J. P. Richardson, 33 An. p. — and —; and authorities there quoted. We, therefore, conclude that Richardson is not liable.

It is, therefore, ordered and decreed that the judgment of the lower court in so far as it condemns Richardson to pay plaintiffs any amount, be reversed, and that, in so far as it relieves him from responsibility to the plaintiffs, it be affirmed, and proceeding to render such judgment as said court should have rendered,

Union Bethel African Methodist Episcopal Church vs. Civil Sheriff et al.

It is ordered, adjudged and decreed that plaintiffs' demand be rejected, with judgment in favor of the defendants, at the costs of plaintiffs in both courts.

Mr. Justice FENNER recuses himself, having been consulted as counsel.

Rehearing refused.

No. 8060.

UNION BETHEL AFRICAN METHODIST EPISCOPAL CHURCH VS. CIVIL SHERIFF ET AL.

Though the name of the surety is not inserted in the body of an Appeal bond, the fact that such surety has signed the bond under the name of the principal, is sufficient.

A promissory note may be antedated.

A party against whom executory process has issued, cannot enjoin it, on the ground that the property seized does not belong to him.

Damages cannot be allowed in the same decree which dissolves an injunction in cases of executory process. Previous Decisions affirmed.

A PPEAL from the Civil District Court for the parish of Orleans.
Rightor, J

Joseph P. Hornor, Francis W. Baker and Jas. A. Reid for Defendants and Appellees:

First—A promissory note may be antedated, and will be valid in point of law, there being no statute to the contrary.

Story on Promissory Notes, chap. 1, sec. 48; Bayley on Bills, chap. 3, Sec. 7; Chitty on Bills, chap. 5, p. 169 (8th edition).

Second—The burden of proof is upon the plaintiff, he must make out his case.

Third—The sale of property seized under executory process cannot be enjoined on the ground that it does not belong to the defendant, but to others; it is for the latter to resist the process if they desire to do so. 30 An. 593.

Fourth—Where an appeal is manifestly taken for delay damages should be given for such frivolous appeal. 21 An. 30; 1 Hennen, Appeal, ix, f.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

TODD, J. The motion to dismiss the appeal is on the following grounds, to wit:

1st. That the bond is insufficient in amount for a suspensive appeal.

2d. That there is no security named in the body of the bond.

First. The appeal is taken from a judgment dissolving an injunction with one hundred dollars damages.

The appeal bond is for three hundred dollars, and being an amount for one-half over and above the damages awarded by the judgment and costs, is sufficient in amount.

Union Bethel African Methodist Episcopal Church vs. Civil Sheriff et al.

Second. The bond is signed by the principal and under the name of the principal, is the name of another purporting to be that of the surety. We had occasion to consider this ground of the insufficiency of the bond in the case of Patrick Coyle vs. Succession of Wm. Crevy, where the same alleged irregularity existed, and in the judgment rendered on the rehearing in said case, we held that it was not such an irregularity as would vitiate the bond.

The motion to dismiss is, therefore, denied.

ON THE MERITS.

The plaintiff is appellant, from a judgment dissolving an injunction taken out against the execution of an order of seizure and sale.

The order in question was granted to enforce the payment of certain promissory notes, signed by John A. Marshall and Geo. W. Bryant, and secured by special mortgage upon the property described in the plaintiff's petition.

The grounds of the injunction are, substantially :

That the plaintiff corporation is not bound on the notes executed by the parties named. That they were executed before the corporation had an existence. That the property mortgaged belonged to the obligors of the notes, and that the corporation had made improvements thereon, of which it was about being deprived, and that the notes had been paid in part, but the proper credits not given.

We find the facts to be :

That the Union Bethel African Methodist Church was organized by an act of incorporation passed before a notary public on the 11th December, 1875.

On the 11th January, 1876, it was resolved by the board of trustees of said church to purchase the property in question, and the parties named, Marshall and Bryant, were authorized to carry out the purchase and sign the notes for the price, and the necessary acts of sale and mortgage.

On the 18th of the same month, a sale of the property mentioned was made by the board of trustees of the Thalia Street Presbyterian Church to the Union Bethel African Methodist Church, and the notes and the act of mortgage securing them, were executed by the persons charged with this duty by the previous resolutions referred to. The notes were stated in the act to be dated on the 1st of December previous, but are paraphrased and identified with the mortgage then given ; and these notes were subsequently transferred to Peter R. Middledness, one of the defendants.

The antedating the notes in question in no manner impaired their

Lewis, Tutor, vs. New Orleans Savings Institution.

validity or affected the liability of plaintiff to pay them. They were not executed, as alleged, before the corporation existed, as stated, but afterwards, as the record shows. "Notes may be antedated or postdated, and in both cases will be valid unless some statute exists to the contrary." Story Promissory Notes, chap. 1, Sec. 48; Chitty on Bills, chap. 5, p. 169; Bayley on Bills, chap. 6, section 7, chap. 3, section 7.

They were executed, as we have seen, by the express authority of the plaintiff.

If the plaintiff was not the owner of the property seized, he has no ground to complain. 3 An. 593. He asserts no reason or principle upon which to base a claim for the improvements, nor inform us of their value.

There is no proof of any failure to give due credit for the payments alleged to have been made. The injunction, in fact, seems to have been taken out in entire absence of any just ground of complaint, and would present a case for the infliction of increased damages for the abuse of the remedy; but we cannot award them as asked for, it being now settled that no damages can be summarily allowed in the same judgment dissolving an injunction against an order of seizure and sale, but the parties must be left to their remedy on the injunction bond. Dejean vs. Hebert, 31 An. 721; Cane vs. Cawthorn, 33 An. 954; Thompson vs. Lemelle, 32 An. 932; Testart vs. Belot, O. B. 55, p. 241.

And for this reason and by force of this authority, we must even amend the judgment of the lower court allowing damages. Without this amendment, however, the appellee would not be entitled on his motion to damages for a frivolous appeal, he having asked for an amendment of the judgment.

The judgment appealed from is amended by disallowing the damages awarded therein, and as thus amended, is affirmed, defendants to pay costs of appeal.

No. 7322.

HARRY LEWIS, TUTOR, VS. THE NEW ORLEANS SAVINGS INSTITUTION.

The incompleteness of the Transcript is attributable to the Appellee himself and not to the Appellant, and the Motion to dismiss the Appeal should, therefore, be denied.

The object of the demand is not the same as in the former suit, and the exception of *res judicata* should be dismissed.

A PPEAL from the Fifth District Court for the parish of Orleans.
Rogers, J.

B. R. Forman for Plaintiff and Appellant.

Bayne & Renshaw for Defendant and Appellee.

Mott & Kelley on the same side.

ON THE MOTION TO DISMISS.

The opinion of the Court was delivered by

MARR, J. Plaintiff appealed from a judgment dismissing his suit on the exception *res adjudicata*. Appellee, defendant in the District Court, moves to dismiss, on the ground that the transcript is incomplete. "That it does not contain all the testimony adduced upon the trial in the lower court; and that said incompleteness is attributable to the appellant, as appears by the annexed affidavits."

The affidavits referred to are those of the clerk and deputy clerk of the District Court, of the same date as, and filed with the motion to dismiss. The deputy states, substantially, that the transcript was prepared under his supervision; and that the certificate, which is appended to it, showing that it is complete, is erroneous, and was made through inadvertence; that certain testimony which was offered by plaintiff, Harry Lewis, tutor, on the trial, does not appear in the transcript; that deponent requested appellant's counsel to supply the same for the preparation of the transcript; that it was not supplied; and that the testimony not in the transcript has not been written out by the stenographer.

That on the day on which the transcript was filed in this Court, 13th January, 1879, as soon as deponent remembered that it was not complete, and that the certificate was incorrect and had been given in error, he unsuccessfully attempted to have it corrected before the transcript should be filed.

The affidavit of the clerk states that he signed the certificate as presented to him, supposing it to be correct, but that it is erroneous in that the transcript does not contain all the testimony adduced on the trial.

On the 27th January, three other affidavits were filed and submitted with the motion to dismiss: one by the same deputy clerk, one by the clerk, and the third by the stenographer of the court. The deputy states that no testimony was taken on the trial; that all the testimony taken in a case in the same court, between the same parties, No. 8597 of the docket, was offered in evidence, but a part of it had not been written out in long hand, and is not yet written out nor on file; and that the record contains all the testimony written out in long hand and on file in that case. The affidavit of the clerk merely confirms and corroborates this statement.

The stenographer states that on the trial of the exception, the testimony taken in the case No. 8597, tried at the last term, between the same parties, was offered in evidence. That all this testimony was not written out in long hand, because the attorney for defendant, appellee in this case, "directed me not to do so, and stated that the case would

Lewis, Tutor, vs. New Orleans Savings Institution.

not be appealed, but would be settled. That in settling the costs of said case he did not pay for the writing out of said testimony in full, which, he said, would not be necessary." That all the testimony has not been written out for that reason; and that all the testimony written out is in this record.

The certificate of the clerk is that the preceding 164 pages "contain a full and complete transcript of all the proceedings had, testimony and evidence adduced, and all the documents filed upon the trial of the case," etc.

The affidavits do not impeach nor contradict this certificate. On the contrary, they show that it is correct, and they also show that the alleged incompleteness is attributable to the appellee and not to the appellant.

The stenographer's notes were not offered in evidence; they are not the testimony adduced on the trial. They are memoranda taken by him during the trial, from which he can afterwards write out and report intelligibly what the witness said on the trial; but they are wholly unintelligible to those who are not acquainted with his system.

There was no occasion for the stenographer to preserve the notes, after he had been informed by the defendant's counsel that there would be no appeal, and that the case would be settled; and it is not shown that they were in existence when this case was tried. No witness was called; no testimony was taken, and the offer of all the testimony offered in the suit No. 8597 was, necessarily, restricted to that which had been written out and was on file, and could be submitted to, read and understood by the judge.

The motion to dismiss is, therefore, overruled at the cost of appellee.

ON THE MERITS.

BERMUDEZ, C. J. This is an action to recover \$2000, the stated value of certain jewelry said to have been contained in a tin box deposited at a particular time by the deceased mother of plaintiff's ward, in the savings institution, defendant herein.

The defense of *res judicata* was interposed.

From a judgment sustaining it, the plaintiff appeals.

The evidence shows that, in a previous suit, the plaintiff brought an action for \$3000 in coin and \$5000 jewelry, deposited during the same period, by the same person, in a box, with the same institution.

On the trial of the case, the character or the value of the two boxes was inquired into, and a witness valued the contents of one of the boxes, the tin box, at eight hundred dollars, and those of the other box, a paper box, at two hundred and fifty dollars.

The jury rendered a verdict for \$2181 and interest for the cash deposited, and for \$250, for the contents of a box.

The verdict was responsive to the prayer of the petition which was for the cash deposited and the jewelry contained in a box. The judgment of the Court was in accordance with the verdict.

It is evident that the jury did not make any allowance for the contents of the tin box, no doubt because they thought they would be granting relief *ultra petitionem*. Had they found plaintiff entitled to a certain sum as the value of the contents of the two boxes, as we think they might have done, there can be no doubt, particularly as the judgment as rendered was satisfied, the exception of *res judicata* would have been a good defense ; but it is manifest that they have not done so.

5 An. 666; 10 An. 228; 19 L. 325; 8 M. 307; 13 An. 415; 20 An. 73 ; 24 An. 73; 26 An. 321; 27 An. 370; 2 M. 142; 2 La. 61; 8 La. 64; 17 L. 94; 22 How. 96.

The *quid judicandum* and the *quid judicatum* accord. What was not allowed by the jury can be claimed by the plaintiff in a different action. The *corpus* in the former is not the *corpus* in the present suit. The object is not the same. The plea is not, therefore, well founded. R. C. C. 2286 ; C. N. 1350.

It is, therefore, ordered and decreed that the judgment appealed from be reversed, that the exception be overruled, and that the defendant be ordered to answer to the merits ; and

It is further ordered and decreed that the case be referred to the Civil District Court for the parish of Orleans, which has superseded the Fifth District Court for the same parish, before which this suit was brought, to be further proceeded with according to law, the defendant and appellee to pay the costs of appeal.

CASES ARGUED AND DETERMINED
IN THE
Supreme Court of Louisiana,

In New Orleans, During the Year 1881, and not Reported in Full.

No. 7977—Pierre G. Gilbert, Tutor, vs. O. Vallette and F. B. Charpau.

No. 7724—Henry Burmeister vs. Mary Frantz, his wife.

No. 7088—Robert McNamara vs. James Andrews & Co.

No. 6743—Henkle & Duggan vs. N. O. Cotton Seed Association.

No. 6901—Martin Ivens Jr., vs. H. S. Buckner.

No. 6798—Tripland & DeBebian vs. Robert Dalzell.

No. 7831—T. A. Laroque Turgeau vs. G. B. Treloar.

No. 6756—Leech, Harrison & Forwood vs. Samuel Cranwell.

No. 6942—N. O. Republican Printing Co. vs. City of New Orleans.

No. 5837—John Leisy vs. A. McNeil.

No. 7485—Ernest Steinhardt vs. John H. Scott.

No. 7135—Johnson & Faulkner vs. L. H. Christeson.

No. 8049—Mrs. Rosema D'Aunoy vs. Jos. Hernandez.

No. 7089—C. A. Miltenberger vs. Wm. Ebert and M. Schwartz.

No. 7762—Succession of Wm. Selliman.

No. 7920—Henrietta Von Ullrich vs. Hugo Von Ullrich.

No. 6494—George Edmunds vs. Mrs. Henrietta Davidson, Executrix.

No. 8130—Camp Flournoy, Under-tutor vs. J. D. Cawthon, Sheriff, *et al.*

No. 6788—H. A. Schroeder vs. D. C. Holliday.

No. 6795—Thomas J. Meshen vs. S. F. Gould.

No. 8226—Bussey & Co. vs. R. K. Anderson *et al.* Cyrus Bussey, Intervenor.

No. 7927—Samuel Friedlander vs. Succession of M. Dietrich.

No. 7234—Joaquin Roses vs. Jules Lacoste.

No. 7111—Joseph A. Shakespeare vs. Alex. McNeil *et al.*

No. 7109—A Levy and J. R. Hyams vs. E. B. Whelock & Co.

No. 7110—Henry Gardes vs. Paul J. Christian.

No. 7143—Charles Mayer vs. Honoré Labasse.

No. 7761—W. H. Moon vs. T. Gilmore, Executor.

The above cases involve issues of fact mainly.

No. 8172.

Wallace & Handlin vs. W. S. Calhoun et al.

Appeal dismissed for want of jurisdictional amount.

No. 7965.

City of New Orleans vs. Poydras Orphan Asylum.

Case similar to that between the same parties, reported as No. 7964.

No. 8184.

George W. Kearney vs. Frank Prue.

Appeal dismissed for want of jurisdictional amount.

No. 8030.

City of New Orleans vs. Laurent Zoller.

Case similar to that of City of New Orleans vs. Meister, reported.

No. 8193.

David Lenoir et al. vs. Leon Gauthier, Sheriff, et al.

Appeal dismissed for want of jurisdictional amount.

No. 8315—State ex rel. Benson vs. Rogers, Judge, etc.

No. 8313—State ex rel. vs. Thos. Duffy.

No. 8312—State ex rel. vs. Lazarus, Judge, etc.

No. 8316—State ex rel. vs. Rogers, Judge, etc.

Applications for *Habeas Corpus* and *Mandamus*. Refused.

No. 8170.

State ex rel. vs. L. Arnault et al. vs. E. A. Burke, Treasurer, et al.

Certain public officers of the parish of Orleans claiming right of preference in the "Judicial Expense Fund."

No. 8011.

City of New Orleans vs. E. A. Yorke et al. *

This case is similar to that of the City of New Orleans vs. Eclipse Tow Boat Co.

No. 8005.

City of New Orleans vs. Joseph Cooper.

Same issues as in City vs. Eclipse Tow Boat Co.

No. 8234.

Estate of Patrick Dwyer, deceased.

Appeal dismissed for insufficiency of transcript.

No. 7973.

Pierce Butler vs. Mrs. Cora A. Slocomb.

The issues in this case are the same as in No. 7993 between the same parties.

No. 8268.

State of Louisiana vs. J. J. Capdeville.

Same issue as in case of State of Louisiana vs. Mrs. Susan Baum, reported.

No. 8272.

State ex rel. Weiller & Ellis vs. Judge, etc.

Application for Certiorari and Mandamus, under Act 90, Constitution of 1879. Refused.

No. 7980.

C. Mehle, H. Donnenfelsen, Subrogated, vs. M. Lachley.

Suit for compensation for the use of a wharf and landing on the Mississippi River.

The principle that such a claim is legal is re-acknowledged in this case.

No. 6849.

J. Iznaga Del Valle vs. W. J. Hodgson et al.

Same issues as in case of Mrs. Miller, wife of Jackson vs. Handy, Sheriff et al., reported.

No. 7500.

State ex rel. U. Dellande vs. N. O. School Board.

Suit to compel the admission of colored children in a school of white children. Decided adversely to the Relator.

No. 8252.

Maria Louise Cass vs. Charles L. C. Cass.

Rule on Clerk of Supreme Court to compel him to file a motion for extension of time. Decided adversely to the Mover.

No. 7870.

Amedee Testart vs. H. Belot, et al.

Damages cannot be granted in the same judgment which devolves an injunction in cases of executory process. A separate suit for damages must be brought on the injunction bond.

No. 6787.

James Wood vs. City of New Orleans.

Claim for damages *ex delicto* prescribed by one year.

No. 8400.

J. S. Richardson vs. E. M. Cramer et al.

Suit for damages against Sheriff for acts of alleged malfeasance.

No. 8039.

State ex rel. J. Benj. Chandler vs. Auditor, Treasurer, et al.

Mandamus to compel Funding Board to fund warrants into Baby Bonds. Amount not ap-
pealable.

No. 7061.

J. B. Wolfe & Co. vs. Lehman, Abraham & Co.Case remanded with directions about the pleadings.

No. 6902.

Interdiction of J. M. Bowditch.The interdict died pending an appeal from the judgment of interdiction; the sole question involved relates to the costs.

No. 8237.

Henry Kolve vs. Board of Health et al.Motion to dismiss appeal for insufficient transcript. Refused.

No. 8024.

Succession of Françoise Rochinault, deceased wife of Jean Sabatier.Motion to dismiss appeal for want of legal citation. Refused.

No. 8412.

State ex rel. Henry Williams vs. Constable, &c.Application for *Habeas Corpus* to the Chief Justice, which he declines to entertain while the Court is in session.

No. 8370.

State ex rel. E. Stahl vs. J. C. Baum, Justice of the Peace.Mandamus made peremptory.

No. 8353.

State of Louisiana vs. August Davis.Criminal case. No error in the proceedings, on the face of the record.

No. 8004.

Mrs. E. Cazabat vs. Haspel & Davis.Case settled after appeal taken. No controversy before this Court.

No. 8288.

State ex rel. Mrs. L. E. Herwig vs. Monroe, Judge, etc.Application for Mandamus. Refused.

No. 7970.

Mrs. Ada B. Walker vs. Mrs. L. T. Barelli.Application for removal to United States Circuit Court. Refused.

No. 8257.

State ex rel. Louise Destréhan vs. Judge, etc.

Application for Prohibition and Mandamus, under Art. 90 of Const. 1879. Refused.

No. 8151.

Elmore Dufour and Henry Frellsen vs. J. G. W. Leftwich.

A mortgage creditor has no interest to contest the validity of a public sale, when, if the sale were set aside, a prior mortgage would more than absorb the value of the property.

No. 7978.

Shakespear, Smith & Co. vs. L. Spangenberg, Jr.; N. O. Canal and Banking Co., Third Opponents.

Conflict of privileged and mortgage claims to the proceeds of property sold by the Sheriff.

No. 8218.

J. H. Tull et al. vs. Mrs. E. J. Easterly et al.

Appeal dismissed for insufficiency of transcript, attributable to Appellant.

No. 7979.

The State ex rel. G. W. Dupré vs. Allen Jumel, Auditor.

Suit dismissed on plea of *res judicata*.

No. 8133.

Felix Brand vs. Town of Donaldsonville.

Same issues as in the case of C. A. Johnson vs. same defendant. Reported.

No. 7869.

J. Osborn, Executor, &c., vs. G. S. Johnson.

Appeal dismissed for want of jurisdictional amount.

No. 8054.

City of New Orleans vs. New Orleans & Carrollton R. R. Company.

Suit for taxes. Assessment declared legal.

No. 7139.

State ex rel. John Mathers, Jr., vs. Allen Jumel, Auditor.

Application for a Mandamus. Refused.

No. 8166.

State of Louisiana vs. Dick Richards.

Criminal case. Judgment affirmed on the face of the proceedings.

No. 6362.

John DeBennville vs. C. V. Thibaut et al.

Same issues as in the case of Fox vs. Thibaut, No. 6361. Reported.

No. 8154.

The State ex rel. T. J. Ford vs. The Attorney General.

Application for a Mandamus to compel the Attorney General to appeal from a judgment adverse to the Relator who claims the office of Recorder in the parish of Orleans. Refused.

No. 8382.

State ex rel. vs. Mrs. Mary A. Pike, vs. Sherburne, Judge, etc.

Application for Mandamus. Not entertained.

MONROE.

No. 1005.

L. H. Gardner & Co. vs. W. L. Richmond et al.

Issues of Fact.

No. 1023.

W. P. Smith vs. W. C. Hall. C. Patterson, Intervenor.

Application for a Certiorari. Case unappealable. Refused.

No. 1019.

John W. Watt vs. John G. W. Lewis.

Issues of Fact.

No. 997.

A. V. Witkoski and Husband vs. A. L. Alley.

Issues of Fact.

No. 1021.

John W. Patterson vs. Hugh Yongue, individually and as Administrator.

Issues of Fact.

No. —.

John Chaffe & Sons vs. W. W. Farmer, Administrator.

Suit by creditors of a succession for removal of an Administrator, and infliction of penalty for non-filing of accounts and maladministration.

OPELOUSAS.

No. 1129.

B. J. Sage, Agent, vs. Wm. S. Evins.

Issues of Fact.

No. 1139.

Estate of Charles François, deceased.

Issues of Fact.

No. 1113.

State of Louisiana vs. Helaire Francois.

This case presents the same questions as the case of the State vs. Samuel Harris, reported.

No. 1130.

Estate of Wm. Offutt, deceased.

Classification of claims of creditors.

No. 1132.

Elisha Andrus, Tutor, et al. vs. Thomas C. Anderson.

Issues of Fact.

No. 1136.

Jacob U. Payne vs. Thomas C. Anderson.

Tax sale set aside on account of illegal assessment. Want of tender must be specially pleaded.

SHREVEPORT.

No. 75.

John Caldwell vs. John Lake, Sheriff, et al.

Issues of Fact.

No. 63.

T. W. Fuller, Tutor, et al. vs. M. M. S. MacKenzie et als.

Issues of Fact.

No. 53.

John Gibson et al. vs. Mary E. Dooley and husband.

Issues of Fact.

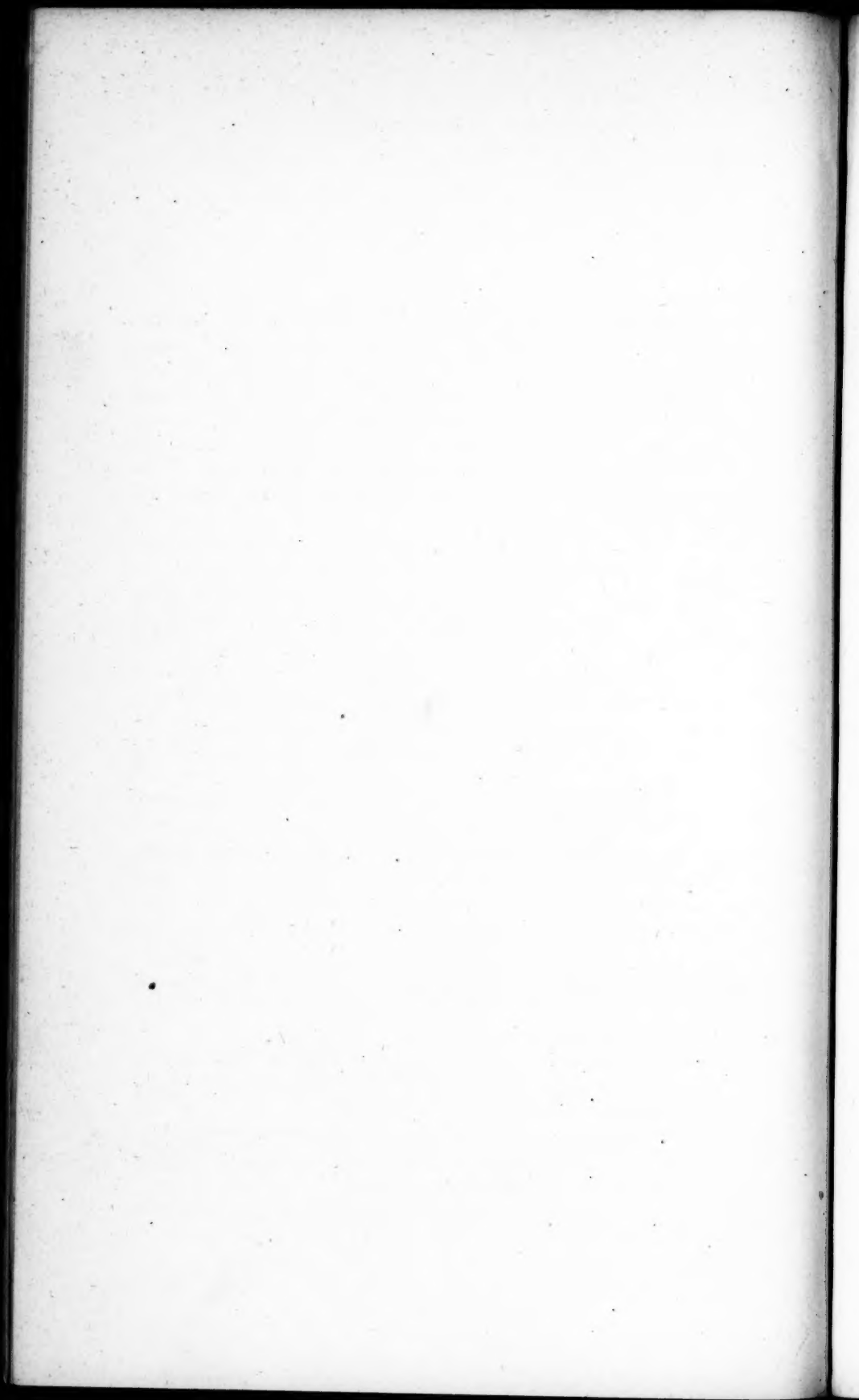
State vs. Harry Washington, Henderson Johnson, Henry Tippet, Rufus Rainey and Adam Miller.

Habeas Corpus Case, decided by Associate Justice Todd, at Bastrop, Louisiana, in Chambers, on the 3d of October, 1882. Recorded in Opinion Book 56, New Orleans.

Where two or more persons have been arrested on a charge of murder, and after an examination before the District Judge sitting as Committing Magistrate, they have been committed to jail to answer to the charge of murder, the one as principal and the others as accessories before the fact, have been subsequently indicted in accordance with the order of commitment, one as principal and the others as accessories before the fact, have pleaded to the indictment and have been put on their trial together, under it, and after the jury has been empanelled in behalf of the State, the District Attorney offers to enter a *nolle prosequi*, as to those so charged as accessories; the accused have the right to oppose the motion, and to insist that the jury be permitted to return a verdict in their plea.

If this demand is refused them and with leave of the Court a *nolle prosequi* is entered, the Judge cannot legally recommit the accused to jail to answer again to the charge of murder, either as principals or accessories before the fact; and if recommitted, they are entitled to claim their discharge under a writ of *habeas corpus*, and their discharge should be ordered.

The indictment and prosecution on the original charge, and the proceedings thereunder presented a bar to a further prosecution for the same offense, either as principals or accessories before the fact.



INDEX.

ACTIONS.

1. When a judgment is absolutely null for defects patent on the face of the record, a suit for the recovery of property sold in execution of such judgment, is more properly a petitory action, and not one strictly of nullity, which, under the law, could only be brought before the same court which rendered the judgment. The demand in nullity, in such case, is only incidental and does not control the question of jurisdiction. Such an action of revendication of the property illegally seized and sold, can well be brought before any court of competent jurisdiction.

Mary C. Bledsoe et al. vs. M. P. Erwin et al., 615.

APPEAL.

1. Repeated applications for further time had been made by Appellant, supported by the Certificate of the Clerk of the lower Court, that it was necessary to complete the Transcript of Appeal; and the additional time asked for, was granted by this Court; waen Appellee showed by the Certificate of the Clerk of the lower Court, that the Record to be transcribed was in the hands of Appellant's Counsel all the time that application was being made for further delay. Appellee moved, in making this showing, that the order for further delay be rescinded and the Appeal dismissed. *Held* that the order should be rescinded, but, as there is no Transcript and, therefore, no Appeal before this Court, there is none to dismiss.
Succession of Henry Kuntz, 30.

2. This is a suit for \$154, brought in the late Parish Court of the Parish of Iberville; judgment was rendered for said amount and an Appeal taken to the late Fifth Judicial District Court; after the adoption of the Constitution of 1879, the case was transferred to the 23rd Judicial District Court for the Parish of Iberville, organized under said Constitution.

Relator asks that the 23rd Judicial District Court, being without appellate jurisdiction in the matter, be ordered to dismiss the Appeal and issue execution on the judgment.

Held that under a proper interpretation and understanding of the provisions of the Constitution of 1879, the case is to be tried *de novo* by the 23rd Judicial District Court.

The State ex rel., Adrien Bonnet vs. Samuel Mathews, Judge ad hoc, 103.

APPEAL—Continued.

3. An extension of time of thirty days being granted by this Court, to file the Transcript of Appeal, the Appellant on the day after the thirtieth day of the extension allowed, applied for additional time: *held* that the application is too late, and the Appeal should be dismissed.

Paul Lacroix vs. Martial Bonin, 119.

4. A Motion in this Court, before the case is on trial, to strike out of the Transcript of Appeal documents alleged to have never been offered in evidence, is without precedent and will not be entertained.

The State ex rel. Jacob Meyers vs. Board of Liquidation, 124.

5. On the last day for applying for an extension of time to file the Transcript, the Appellant filed his application in the Clerk's office, the Court not being in session. Five days after, the Court being in session, granted the time asked for. *Held* that this time is to be computed from the day the application was filed in the Clerk's office.

Eugene Chrétien vs. Benjamin Poincy, 121.

6. This Court will dismiss the Appeal *ex officio* when there is no copy of the judgment appealed from, in the Transcript.

When the Appellant goes to trial on an insufficient Transcript, without suggesting a diminution of the record, and the Appeal is, therefore, dismissed, he shall not be permitted, after the judgment of dismissal, to complete the Transcript.

A rehearing will not be granted in such a case.

The right of parties before this Court, under agreement of Counsel, to supply the deficiency of the Transcript, must be exercised *before* and possibly *during* submission, but surely not *after judgment*.

Henry Bacas vs. Thomas Smith, 139.

7. A judgment of the late Parish Court of the parish of St. Mary, passing upon the constitutionality of a certain municipal ordinance of Morgan City, was appealed from directly to this Court and the Appeal dismissed on legal grounds. The present Relator then obtained an Appeal from the said original judgment of the Parish Court to the Court of Appeals of the Fifth Circuit, which also dismissed that Appeal. This is an application for a *Mandamus* to compel the latter Court to try the case. *Held* that the dismissal of the Appeal by this Court rendered the judgment of the Parish Court final.

The State ex rel. Morgan City vs. Judges, etc., 151.

8. The Appeal in this case was made returnable on the first Monday of November. A rule was taken in the lower Court by Appellee to have the order of Appeal set aside for cause. Pending this Rule, Appellant filed the Transcript in this Court, in September, before the return day. In October, the rule was made absolute and the order of Appeal set aside by the lower Court. *Held* that the Appeal comes to this Court without any order and should be dismissed.

Chas. S. Stiele vs. Sarah M. Millspaugh, 194.

APPEAL—Continued.

9. A motion to dismiss for incompleteness of the Transcript or any mere informality, must be made within three judicial days after the filing.

When an appeal is dismissed for failure of the Appellant to file the transcript in time, it shall be considered as abandoned, and he shall not afterwards be allowed to renew it.

- A *Curator ad hoc* appointed to represent an absent defendant, has no right to abandon the Appeal taken by him.

Neuville Bienvenu vs. Factors' and Traders' Insurance Co., 209.

10. The surety on an Injunction bond, against whom no damages were prayed for, or granted, in the lower court, is not a necessary party in this Court, and absence of citation of appeal to him is no cause of dismissal of the Appeal.

An Appeal shall not be dismissed when the Transcript is filed after the Appeal Term, but within the extension of time granted by this Court. *Widow Caroline Tilton vs. Joseph Vignes et al.*, 240.

11. An appeal does not lie from a preliminary Injunction *pendente lite*. *Town of Donaldsonville vs Police Jury*, 248.

12. In the absence of any name as payee of the Bond of appeal, this Court will consider the Bond payable to the person to whom the law makes it so, to wit: the Clerk of Court; and will not dismiss the Appeal on that ground.

Miss Kate Nugent vs. John McCaffrey, 271.

13. The "contribution" which the Board of Levee Commissioners is authorized by law to levy upon all lands protected by the levees etc., is not a "tax, toll or impost," within the meaning of the Constitution. Affirming previous Decisions.

The question of the legality of such contributions will, therefore, not be considered by this Court in a case in which the amount involved is below its appellate jurisdiction.

Board of Levee Commissioners vs. Lorio Bros., 276.

14. The matter in dispute in this case being the difference between the value put upon Plaintiffs' property by the Assessor and that put upon it by the Plaintiffs themselves, and that difference being less than \$1000, this Court has no jurisdiction. The constitutionality and legality of the tax itself are not at issue.

Gillis & Kennett vs. Clayton, Assessor, 285.

15. This is an Appeal from a judgment decreeing the nullity of a tax sale of a tract of land. Nothing in the record shows the value of the land. The appeal is, therefore, dismissed. It must appear affirmatively and clearly, from the amount of the matter in dispute, that this Court has jurisdiction.

Heirs of Amos Adams vs. Heirs of J. B. Starks et al., 304.

APPEAL—Continued.

16. The order of a District judge recusing himself and directing a case to be tried by the judge of an adjoining District, instead of by an attorney of the bar as judge *ad hoc*, is an interlocutory decree, which can cause no irreparable injury, and from which, therefore, no appeal lies.

The consent of both Appellant and Appellee cannot vest this Court with jurisdiction.

Widow John Fields vs. J. A. Gagné and wife, 339.

17. Appellant obtained an order for both a suspensive and devolutive appeal, but failed to file the transcript on the return day. Within the year, however, he obtained another order for a devolutive appeal, and then filed the bond and Transcript.

Held that this second appeal is valid and that Appellant's failure to perfect the first appeal is not an abandonment thereof.

Mrs. M. J. Bowie vs. S. M. Davis, 345.

18. In the extension of time granted by this Court for filing the Transcript of appeal, days of public rest should be counted.

An agreement entered into *before* the return day, by which citation of appeal is waived and considered as served in due time, cannot be construed as a consent that the Transcript be filed after the legal delays, and a renunciation on the part of the appellee of the right to move the dismissal of the appeal on that ground.

O. A. Pierce, Kenyon, assignee, vs. W. L. Cushing et al., 401.

19. A party who pays the amount of a judgment against him, by compulsion and under protest, cannot be considered as acquiescing in the judgment and be thereby deprived of his right of appeal. Decision in 29th An. 762 affirmed.

The surety on an injunction bond, though constructively in court, should be notified of the judgment rendered against him, if he filed no answer or actual appearance, and, in default of such notice, he is always in time for a suspensive appeal.

The same surety inasmuch as the case was tried without his appearance and virtually *ex parte*, as to him, is entitled to the maintenance of his appeal even if the Transcript is defective by the fault of the plaintiff in the case, the other appellant.

The failure of an appellant to perfect his suspensive appeal by giving bond within the legal delay, does not deprive him of his right to a devolutive appeal within the year.

In the absence of written evidence in the record, and the assignment of errors being insufficient, the neglect of the appellant to have asked for and obtained a statement of facts, will cause the dismissal of the appeal.

Pierre Verges vs. Gonzales, Sheriff, et al., 410.

APPEAL—Continued.

20. This Court will take notice *ex proprio motu* of the unappealable amount of the matter in dispute before them, and dismiss the appeal. *Schmidt & Ziegler vs. A. C. Brown and R. Strauss*, 416.
21. An appeal bond, which does not contain the condition that the appellant shall prosecute the appeal, and which is not given to secure the payment of the costs of both the Supreme Court and the inferior Court, is defective and invalid.

John Rawle, agent, vs. Mrs. E. M. Feltus and husband, 421.

22. Although the jurisdiction of the lower Court ceases when the order of Appeal has been granted and the bond filed, yet the Court retains its power over its Clerk to compel him to fulfil the ministerial duties of his office, in the case.

The State ex rel. C. L. C. Cass vs. J. T. Clark, Clerk, 422.

23. A suspensive appeal from a judgment dissolving a preliminary injunction and rendered on a Rule *nisi*, does not deprive the defendant of the right of having the case tried on the merits in the lower Court, even where the injunction is the sole relief sought by the plaintiff.

The State ex rel. Butchers' Union, etc., vs. Judge, etc., 436.

24. The case being fixed for trial on the merits in this Court, whether or not the bond is sufficient for a suspensive appeal, the Appellee has no interest to have the appeal dismissed as suspensive, inasmuch as the case would still remain in this Court on the devolutive appeal.

Heirs of Stafford vs. Henry Renshaw, 443.

25. It is no good cause of complaint for the Appellant and no ground of dismissal, that three appeals taken by different parties in the same case, be embraced in one Transcript.

Insufficient service of citation of appeal, not attributable to the Appellant, should not cause the dismissal of the appeal.

Mrs. Mary Murphy vs. Factors' and Traders' Insurance Co. et al., 454.

26. In an Appeal by third persons, the failure to cite the defendant in the case is fatal and will cause the dismissal of the Appeal.

Mrs. H. Escoubas et al. vs. Calcasieu Sulphur Co., Musson et als., Appellants, 484.

27. An interlocutory order, which dissolves an injunction, on a bond for the amount of damages claimed by the Plaintiff in injunction, cannot work an irreparable injury and is, therefore, not appealable.

George Osgood vs. J. W. Black et al., 493.

28. The fact that a judgment was rendered at chambers, does not exempt the case from the operation of Art. 574 C. P., which provides that no citation of appeal shall be necessary when the appeal has been granted upon motion in open court, at the same term that the judgment was rendered.

APPEAL—Continued.

When the acts enjoined amount to a trespass or a change of possession of immovable property, the injunction cannot be dissolved on bond and an appeal lies from the dissolving order. Decision in *Sigur vs. Judge*, 33 An. 133, affirmed.

Jean Torres et al. vs. Felix Falgoust, 560.

29. The fault is attributable to Appellant, in case of an incomplete Transcript, when it is by his directions that the Clerk has omitted some of the documents offered in evidence.

Article 898, C. P., does not protect Appellant against the consequences of an incomplete Transcript and a clearly defective Certificate of the Clerk, when he takes no steps whatever to remedy the deficiencies of his appeal before the Motion to dismiss is submitted. It has been the constant practice of this Court, under such circumstances, to dismiss the appeal.

Heirs of Jacob Hoover vs. Z. York et al., executors, 652.

30. Two appeals having been granted to the same appellant, the appellee moved the dismissal of both : of the first appeal, for alleged irregularities, and of the second on the ground that the first order having once been granted and a bond thereunder filed by appellant, the lower court was divested of jurisdiction and had no authority to issue the second order. *Held* that, if the first order of appeal was illegal, the lower court was not divested of its jurisdiction over the case and could legally issue the second order.

It has never been held in Louisiana that a party must move for a new trial in a jury case as a condition precedent to his appeal, though it is, as a general rule, proper that he should do so.

To take away the right of appeal, there must be an unconditional, voluntary and absolute acquiescence in the judgment rendered, on the part of the appellant.

Mrs. M. F. Jackson, Adm., vs. Wm. C. Michie et al., 723.

31. An issue which was not raised in the lower Court and is made for the first time in the brief of Counsel in this Court, shall not be noticed or passed upon. *Ib.*

32. Act No. 21 of the Legislature of 1878, chartering the Louisiana Western Railroad Company, and giving it, (sec. 6,) the right to embrace several landholders as defendants in one expropriation suit, does not make the judgment in the premises appealable, on the score that the aggregate amount allowed to all such defendants, exceeds \$1000, though the amount allowed to each respectively, is less than that sum.

- The proceeding in such case cannot be assimilated to a *concursum* of creditors.

The Act in question did not and could not, under the Constitution, attempt to regulate the jurisdiction of this Court.

APPEAL—Continued.

The consolidation of two distinct suits between the same parties, in each of which the matter in dispute is less than \$1000, does not vest this Court with jurisdiction.

Louisiana Western R. R. Co. vs. Hopkins, Kennedy et al., 806.

33. When an appeal is dismissed on motion of the Appellee, on the ground that the Transcript was not filed within the legal delay, though the appellee did not himself bring up the record for the purpose of dismissal under Articles 588-590, C. P., the Appellant shall be considered as having abandoned his appeal and shall not be permitted afterwards to renew it.

O. A. Pierce, Kenyon, assignee, vs. W. L. Cushing et al., 809.

34. When the Appellant files a supplemental petition for the purpose of having one of the Appellees cited, who had been omitted in the original petition of appeal, no additional bond needs be furnished. The original bond in favor of the clerk of court will suffice.

Illegal service of citation of appeal, not attributable to the Appellant, will not cause the dismissal of the appeal.

Although the proper and regular mode of perfecting the Transcript, is by a writ of *Certiorari*, it is useless to issue such writ when certified copies of the missing documents have been filed. Affirming the rule in *City of Baltimore vs. Parlange*, 25 An. 335.

J. Borde vs. Widow Erskine et al., 873.

35. Appellant not having asked that all the Defendants and Warrantors be cited as Appellees, the Appeal must be dismissed.

The want of proper parties in this Court will be noticed at any time, in any form of suggestion and, even, *ex mero motu*.

Widow and Heirs of J. B. Baird vs. Simpronius Russ, 920.

36. Appellant having made no objection to try in the Court below a Rule to rescind the order of appeal, as improvidently granted because the judgment appealed from was rendered by consent, the District Judge did not exceed the bounds of his jurisdiction in making the Rule absolute and rescinding the order of appeal. This Court will not, therefore, control his action by Prohibition. The proper remedy, in such a case, is by appeal from the rescinding order.

The State ex rel. Mrs. Fairex vs. Judge, etc., 927.

37. The judgment appealed from, being rendered against all the Defendants indiscriminately and without severance, and being, therefore, indivisible, and proper showing being made in this Court that one of said Defendants was dead at the time the judgment was rendered and the appeal taken, it is ordered, on Motion of the legal representative of the dead Defendant, that the judgment be set aside and the case remanded to the lower court for the appearance of proper parties.

Mrs. S. E. Myers, Adm. et al. vs. T. G. and F. E. Brigham, 1013.

APPEAL—Continued.

38. This is an injunction suit to prevent the seizure and sale of homestead property worth \$6000. The judgment, of which execution is enjoined, is for \$1076. *Held* that the matter in dispute is the homestead property, and the claim is below the appealable amount, necessary to give this Court jurisdiction.

John Guss vs. Routon, Sheriff, et al., 1046.

39. The amount of the claim, and not that which may be proved, is the test of the jurisdiction of this Court.

Eliza P. Hendricks, wife of T. Woods, husband, 1051.

40. Appeal dismissed by this Court *ex proprio motu*, the matter in dispute being less than \$1000. When third persons enjoin the seizure and sale of property, it is the value of the property which vests this Court with jurisdiction, and not the amount of the judgment enjoined. Re-affirming previous Decisions.

Meyer, Weiss & Co., vs. Logan, Sheriff, et al., 1054.

41. When a judgment by Default has been taken against one of two Defendants, the other Defendant having filed an Answer, and, after trial of the case, Plaintiff's demand is rejected and he appeals, the Appellees cannot pretend that there is no judgment as to the Defendant who made no appearance and that, as he is a necessary party, the Appeal should be dismissed.

H. D. King, Administrator vs. Wm. T. Atkins et al., 1057.

42. The test of the jurisdiction of this Court in an action to enjoin and annul a judgment, is the amount of the judgment itself.

The appealable amount of the matter in dispute necessary for the jurisdiction of this Court cannot be reckoned by the cumulation of plaintiff's demand and defendant's claim in reconvention.

J. W. Smith vs. Merchants' Insurance Co., 1071.

43. Appellees seek to recover judgment against Appellants for \$234, and to annul a transfer of property made by Appellants for more than \$1000. *Held* that the matter in dispute is the right of Appellees to submit the property to the judgment for \$234, and that this Court has no jurisdiction.

Loeb & Bloom vs. J. Arent et als., 1085.

44. In a suit in which the Plaintiff claims \$964, and the defendant admits his indebtedness to the amount of \$600 the matter in dispute is the difference between these two sums, and the case is, therefore not appealable.

A seizing creditor, whose judgment for \$964, is enjoined, cannot, upon dissolution of the injunction and rejection of his claim for the statutory damages, appeal to this Court on the ground that the damages, added to the amount of the judgment, make up the appealable sum.

F. P. Stubbs vs. McGuire, Sheriff, et al., 1089.

APPEAL—Continued.

45. The Clerk's defective Certificate is cured by the agreement of Counsel that, "the Transcript, as made out, is sufficient."

Huey & Wise vs. Police Jury, etc., 1091.

46. An Appeal taken by Motion in open court, being defective because the amount of the bond was not fixed by the judge, cannot be subsequently perfected by an order fixing such amount, rendered at chambers on the Petition of Appellant.

G. A. Fournet vs. J. Van Wickle, 1108.

47. The submission of the controversy in this case to arbitrators, was made with the understanding that they should have power to act as amicable compounders. Under the law (Art. 460, C. P.), the judgment of the Court rendered upon the award, cannot revise it. It follows that the judgment itself is not appealable.

T. B. Hopkins vs. Louisiana Western R. R. Co., 1138.

48. An Appellant should not be prejudiced by the error committed by the judge in fixing the return day of the Appeal.

State of Louisiana vs. J. Dellwood, 1229.

49. The fact that the appeal bond is signed by only one of several appellants, does not vitiate the appeal, in as much as, under the settled jurisprudence of the State, such bond is valid even if not signed by the appellant.

J. Murrell et al. vs. Mary E. Murrell et al., 1233.

50. This Court cannot take cognizance of evidence outside of the Transcript, in support of the charge of Appellant's acquiescence in the judgment appealed from. The case must be remanded for the purpose of such investigation.

It is only when the fact alleged on one side is expressly admitted on the other, that the remanding is unnecessary. The jurisdiction of this Court in such cases clearly defined.

When an Appeal is taken from the decree of a State Court ordering the removal of the case to the United States Circuit Court under the laws of Congress, and the Appellant himself files the Record in the Federal Court and there moves for the dissolution of the Injunction granted by the State Court, there is an acquiescence by the Appellant in the judgment appealed from and the Appeal will be dismissed by this Court.

New Orleans City Railroad Company vs. Crescent City Railroad Company, 1273.

51. In the additional delay granted the Appellant to file the Transcript, the last two days not being legal days should not be counted, and he is in time if he files the Transcript on the first legal day thereafter.

APPEAL—Continued.

This Court will not pass upon objections to the admissibility of evidence, if the Transcript does not show that the Court below ruled upon the objections and the ruling was properly excepted to for review.
E. J. Gueringer vs. His Creditors, 1279.

52. No Appeal lies from an order transferring a case from one to another Division of the Civil District Court for the Parish of Orleans, because such order is interlocutory and cannot cause an irreparable injury. Affirming Decision in 31 An. 47.

S. Hershheim & Bro. vs. I. Levy & Co., 1283.

53. The Court below having sustained the Exception to its jurisdiction and refused to hear and determine the differences between the parties, this Court can only pass upon the said Exception and cannot, in this Appeal, decide the other issue of the case.

Mrs. H. R. Mellor vs. T. Gilmore, Executor, 1404.

54. An Appeal cannot be dismissed on the ground that it was taken by a tutrix, defendant in the case, and that her wards were of age at the time and should have taken the Appeal themselves,—when the Record does not show that said wards were made parties to the suit at their majority.

Mrs. B. Lewis, et al. vs. Widow J. F. Pepin, tutrix, 1417.

55. Though the name of the surety is not inserted in the body of an Appeal bond, the fact that such surety has signed the bond under the name of the principal, is sufficient.

Union Bethel Church, &c., vs. Civil Sheriff, et al., 1461.

ATTACHMENT.

1. On the dissolution of an Attachment issued on the ground that the debtor was about to dispose of his property with intent to defraud his creditors, when the attaching creditor acted without malice and solely under the legal advice of an experienced attorney, the Defendant shall recover the damages actually sustained and no more. Damages actually sustained, comprise not only pecuniary loss and actual expenses incurred, such as costs and counsel fees, but also the mortification, annoyance and vexation caused to the Defendant by the Attachment.

M. L. Byrne & Co. vs. L. H. Gardner & Co., 6.

2. Plaintiff having acquired certain movable property, partly in payment of a debt due him, partly for cash, and having received possession of the same and then hired it to the transferrer, the creditors of the latter cannot attach it by a direct seizure as his property.

Art. 240, C. P., No. 4, is not intended to enable the attaching creditor to dispense with the revocatory action when there has been a real sale of the debtor's property, even if fraudulent, and to seize said property directly, as if the sale were simulated.

ATTACHMENT—Continued,

The fact that, in the attachment suit, the said purchaser signs the bond of the defendant to release the property, does not preclude him from asserting his ownership.

Hugo Redwitz vs. E. Waggaman, Sheriff, et al., 26.

3. Whether or not a garnishee had the legal control of the funds of the debtor in attachment, he is liable to the seizing creditor, if in point of fact, he did control such funds and disposed of them after notice of the garnishment.

Semble that property of the debtor in attachment, coming into the hands of a garnishee after notice of garnishment, is affected by the seizure.

H. Buddig vs. Mrs. L. Simpson, E. C. Palmer, garnishee, 375.

ATTORNEYS-AT-LAW.

1. The graduates of the Law Department of the University of Louisiana must obtain a license from the Supreme Court before they are admitted to practice, as attorneys-at-law, in any court of the State. Section 112 of the Revised Statutes does not make their diploma the equivalent of a license; and they are liable to the Clerk of this Court, under section 756, Revised Statutes, for his fee of \$10, for a certificate of admission. In the present case, the applicant having been admitted to practice in all the courts of the State, by order of this Court, the object of the required license has been fulfilled, and such order is equivalent thereto.

O. Villeré vs. Clerk, etc., 998.

BANKRUPT LAW OF THE UNITED STATES.

1. Drafts drawn by a planter against the proceeds of cotton in the hands of his factor, accepted by the latter and not paid by him at maturity, but taken up and paid by the drawer, do not constitute a fiduciary debt, excepted as such from a discharge in bankruptcy under the law of the United States.

Assuming that the original obligation of the factor was of a fiduciary character, about which there is a diversity of opinion, it is clear that it ceased to be so by the drawing and accepting of the drafts, which changed the nature of the debt and were payable to the holder.

Samuel C. Baines vs. R. L. Adams, et al., 46.

2. Under the Bankrupt law of the United States, a duly certified copy of the Assignment is conclusive evidence of the title of the assignee, and of his authority to sue, without his having to prove the various steps in the bankruptcy proceedings.

Such assignee has the right to sue in the State Courts.

The adjudication in bankruptcy dissolves attachments of the bankrupt's property taken within four months.

T. J. Wooldridge, Assignee, vs. F. Rickert & Co., et al., 234.

BANKRUPT LAW OF THE UNITED STATES—Continued.

3. Under the late bankrupt law of the United States, the property of the bankrupt could legally be sold free of encumbrances, by order of the Federal Court, provided the mortgage creditors were properly notified to show cause why it should not be done.

In default of such notice, the mortgages or privileges on the property were unaffected by the sale.

Therefore, when the mortgage creditor, who was notified, bought the property at the sale ordered by the Court, his mortgage was extinguished by confusion, but he took the property subject to the mortgage of the creditor, who was not notified to show cause why the property should not be sold free of encumbrances.

Such purchaser is a third possessor, not liable to a personal judgment on behalf of the mortgage creditor, but against whom the latter has an action of indemnification for the value of any part of the thing mortgaged, which has been deteriorated or taken away, if the property is not sufficient to satisfy the mortgage.

The purchaser in such case, is not entitled to be reimbursed the taxes on the property and other expenses paid by him, with priority over the mortgage creditor with the pact *de non alienando*. Under the pact, the vendee has no better right than the vendor, the original mortgagor.

Mrs. Mary Murphy vs. Factors' & Traders' Insurance Co., et al., 454.

4. A debtor in bankruptcy, under the Composition Act of Congress of 1874, has sufficiently complied with the requirements of the law when being ignorant of the name of the holder of his promissory note, he has given in his schedule a full description of the note, stating the date, amount, maturity and to whom payable.

A suit subsequently filed by the holder against such debtor, averring the ownership of the note, does not affect the Composition proceedings and does not impose upon the bankrupt the duty of amending his schedule.

Paul Fouchy vs. Bayly & Pond, 778.

5. A debtor, who has been adjudicated a bankrupt under the bankrupt law of the United States, when sued in the State Courts, can interpose his plea at any time before judgment. Such defense need not be heard *in limine*, under the rules of pleading of our State law.

H. Block vs. L. Fitchoe, 1094.

BILLS AND NOTES.

1. The Defendant in this case is the accommodation endorser of the note of a married woman, authorized by her husband. The holder did not have it presented and protested at maturity. Plaintiff charges that Defendant is liable both as surety and as endorser, and in the latter capacity though the note was not presented and

BILLS AND NOTES—Continued.

protested. Defendant pleads she is not a surety and has been discharged as endorser for want of demand and protest. *Held* that, under the circumstances of the case, Defendant is liable as endorser, although the note was not demanded and protested. Full exposition of the law governing the case, like this, of the endorsement of a note for which the maker is primarily not liable.

Pierre Butler vs. Mrs. Cora A. Slocomb, 170.

2. The endorser, who waives protest and notice before maturity, binds himself absolutely by a new contract, and payment of interest by him will interrupt prescription, as to him, even if the drawer's obligation were extinguished by prescription.

Union National Bank vs Succession of Thomas B. Lee, 301.

3. A promissory note may be antedated.

Union Bethel Church, etc., vs. Civil Sheriff et al., 1461.

BOARD OF LIQUIDATION.

1. Having obtained judgment from the District Court against the Board of Liquidation, declaring certain State bonds and warrants legal, and ordering the funding of them, under Act No. 3 of 1874, and the judgment of the District Court not being appealed from, the Relator applied for a Mandamus to compel the Board of Liquidation to fund said bonds and warrants, and issue in their stead the Consolidated Bonds provided for by law.

Held that, under Act No. 11 of 1875, the Board of Liquidation is to fund bonds or warrants, the legality of which is questioned, only after said bonds or warrants have been declared legal and valid by the Supreme Court; and, therefore, the judgment of the District Court, though final, is not, under the special provision of said law, binding upon the Board of Liquidation.

The relator himself, though the judgment of the District Court was in his favor, had the right to bring said judgment up for review by this Court, to meet the express and special requirement of the Statute.

The State ex rel. Jacob Meyers vs. Board of Liquidation, 124.

BURDEN OF PROOF.

1. The burden of proving seasonable and proper notice of the loss by fire, under the terms of the policy of insurance, or valid reasons for not giving such notice, is upon the insured.

W. J. McCall vs. Merchants' Insurance Company, 142.

2. Suit by sheriff against Calcasieu parish for his fees. His account being approved by the Clerk and presiding Judge of the Court, under Sec. 1042 Rev. Sta., the burden of showing illegal charges is on the Parish.

D. H. Lyons vs. Parish, &c., 1170.

CERTIORARI.

1. A party who has sanctioned the proceedings he complained of, cannot have the same avoided through a writ of *Certiorari*. C. P. art. 864.

State of Louisiana ex rel., Zubberbier & Behan vs. Judge, &c., 15.

CESSIO BONORUM.

1. In default of proper evidence in the Record, to show the value of the services of the notary, of the Counsel of the syndic and of the Attorney of absent creditors, in the Estate of an Insolvent, this Court will not disturb the judgment of the District Judge, which has fixed the respective amounts due for such services.

The syndic may, in behalf of the mass of creditors, question the validity of the claims set up by certain creditors in opposition to his Account and Tableau of Distribution.

The charge of undue preference may be made by opposition, in the *concurso* of creditors, and needs not necessarily be made by means of the revocatory action.

The prescription of one year to the action in avoidance of a fraudulent confession of judgment, only begins to run from the time that knowledge of said confession is brought home to the party injured thereby.

The rule of law in revocatory actions, that only such creditors can attack the validity of an act giving an undue preference, whose claims were in existence at the time of the illegal act, does not apply to a contest for the classification of claims in a *concurso* under insolvent proceedings.

The law does not prohibit a creditor, who pays an actual and effective value at the moment of the contract, from obtaining a privilege or security, because he has reasons to suspect the inability of his debtor to pay all his debts.

Nor does the law forbid a creditor holding such security to obtain the privilege by seizure, provided for in Art. 722 of the Code of Practice.

M. L. Byrne & Co. vs. Their Creditors, 198.

2. The duties and powers of the syndic of an insolvent succession are the same as those of syndics of insolvent debtors; he must preserve the assets under his charge from loss by prescription; and for that reason, he is authorized to issue execution on a twelve months bond. The illegality of his appointment cannot be inquired into collaterally and does not affect the validity of his official acts. Previous Decisions affirmed.

Emile Cloutier et al. vs. R. E. Lemée, provisional Syndic, et al., 305.

3. An extrajudicial surrender of his property, made by a debtor to his creditors, especially when some of the latter refuse to accept it, does

CESSIO BONORUM—Continued.

not divest him of the title to that property, and the creditors who declined the surrender have the right to sue the debtor and seize and sell his property, notwithstanding the extrajudicial surrender.

Liquidators of Hart & Hébert vs. Bates, Sheriff, et al., 473.

4. Foreign creditors, having contracted with citizens of Louisiana whilst its Insolvency Laws were in force, cannot claim in the State Courts an exception from the operation of those laws; and an order of a State Court, accepting a *cessio bonorum* and staying further proceedings against an insolvent, will arrest the action of such foreign, as well as of home creditors.

Orr & Lindsley vs. Lisso & Scheen, 476.

5. The title of the insolvent is not divested by the *cessio bonorum*, and his heirs are not estopped from claiming the property surrendered, when it has not been disposed of by the syndic. 11 An. 158.

Walling Heirs vs. A. S. Morefield, 1174.

6. The foreign assignee or trustee of an insolvent Corporation, suing a debtor in this State, cannot urge against the latter's reconventional demand, that the same is equivalent to pleading compensation against an insolvency.

Life Association of America vs. S. Levy, 1203.

CHARITY HOSPITAL OF NEW ORLEANS.

1. The Charity Hospital of New Orleans, originally founded by the private bounty of Don Andrés Almonaster y Roxas, became, by Acts of the Legislature since the year 1811, a State Institution.

As such, it is owned by the State, and, whether or not the title to the property from which it derives revenues for the charitable purposes of its creation, is literally in the State, that property is, at all events, held in trust by the State for the use of those intended to be benefited by the Institution.

Under the laws organizing said Charity Hospital of New Orleans, its property is not liable to seizure and sale under execution.

State of Louisiana vs. G. R. Finlay & Co., et al., 113.

CITATION.

1. Citation addressed to the wife and husband to assist her, and served upon the wife in person, is legal.

Widow A. Holt et al. vs. Liquidators of Hart & Hébert, 673.

CITY COURTS OF NEW ORLEANS.

1. The City Courts of New Orleans can entertain jurisdiction of suits for the ejectment of tenants.

The Sheriff, who has seized property occupied by lessees, has authority to institute such ejectment proceedings before said City Courts in proper cases.

State of Louisiana ex rel. Fredricks vs. Judge, etc., 146.

CITY COURTS OF NEW ORLEANS—Continued.

2. The City Courts have no jurisdiction of a suit involving the right of possession of immovable property. Therefore, they have no authority to eject an alleged trespasser from a house, when the relations of the parties are not those of landlord and tenant

The State ex rel. J. Buisson vs. Judge, etc., 419.

COMMUNITY OF ACQUETS AND GAINS.

1. The title to one-half of the Community property is vested in the heirs of the deceased wife at the moment of her death, and it is not necessary for them, when they claim it, to allege that the Community is liquidated and solvent. Decisions in 25 An. 379, and 26 An. 639, overruled. Decision in 32 An. 848, affirmed.

W. B. Glasscock vs. C. G. Clark, 584.

2. The earnings of a married woman in keeping a boarding-house, during the existence of the Community of acquets and gains, fall into and belong to the said Community. Therefore, a transfer of property made by her husband to her, in payment of her claim against him for the restitution of such earnings, is null and void.

H. M. Isaacson vs. J. H. Mentz et al., 595.

CONTRACTS.

1. A factor having bound himself to make certain advances to a planter to enable him to raise his crop, and having taken collateral securities for the reimbursement of the sums to be advanced, is not released from his engagement by the fact that the planter's place is subsequently overflowed. The refusal of the factor to continue the advances for that reason, will entitle the planter to damages.

But the planter having made a settlement with the factor and taken back the collateral securities without any protest or reservation, must be considered as having waived his claim for damages.

Frank M. Taylor vs. Prestidge, Graham & Co., 41.

2. Plaintiff having based his suit upon the allegation of a contract of employment of his professional services and of a *fixed* compensation for the same, cannot be permitted to prove the value of those services before or without proving the contract itself.

Under the authorities, after proving the alleged contract of employment, if he failed in the further proof of the alleged stipulated fee, he might then be allowed to show the value of the services; but this is not intended to supply the indispensable evidence of the alleged contract itself, in default of which he cannot recover.

George L. Bright vs. The Metairie Cemetery Association, 58.

3. When the officers of a municipal corporation, clothed with legislative functions and having in the exercise thereof, legislative discretion, exceed their power, by error of judgment, in a contract with a party, who had the same means of information as themselves

CONTRACTS—Continued.

about their capacity to contract, and fell in the same error,—the said officers are not personally responsible to the other contracting party, for the non-performance of the contract.

If an action lay in such case against the municipal officers personally, it would be *ex delicto* and prescribed in one year.

M. A. Southworth vs. B. J. Flanders et al., 190.

4. The agreement between the holder of a mortgage note and an attorney-at-law, that the latter shall foreclose the mortgage, receive for his fee, the commission stipulated in the act of mortgage, and warrant his client that he will receive from the sale of the property the full amount of his debt, is a valid and binding contract of suretyship, with a sufficient consideration. But the holder of the mortgage note, by subsequently taking it back from the hands of the attorney-at-law, and receiving the price the property brought at a sale ordered by the United States Bankrupt Courts, cancels the obligation of the attorney-at-law under the said agreement.

Charles E. Alter vs. Hornor & Benedict, 243.

5. To convert a proposition by one party to another into a contract, it is not sufficient to show strong probability that it was or would have been accepted, under certain circumstances: acceptance, actual, final and irrevocable, must be proved.

Geo. W. Stockton vs. Firemen's Insurance Co., 577.

6. Nullity of the title, in execution of which a compromise was made, can only be invoked, as a cause of rescission, when the title was falsely supposed to be valid, through error of fact, not through error of law.

Widow V. Dugas vs. Town of Donaldsonville, 668.

7. The bonds sued upon having been issued in settlement, by compromise, or former claims against the municipal corporation, as in the preceding case of *Widow Viléor Dugas vs. The Town of Donaldsonville*, the fact that the original claims were prescribed when the new bonds were issued, is no defense to an action on said bonds.

V. Maurin et al. vs. Town of Donaldsonville, 671.

8. This is a suit against the payees of two checks, in the body of which it was declared by the maker, that they were given in payment of corn bought from said payees and that the money to be paid by the bank was an advance on exchange sold to it. *Held* that the payees of the checks were not privy to the declarations contained therein and were not bound by them.

Citizens' Bank vs. L. Grand et al., 976.

9. A long settled account will not be opened and disturbed unless upon clear and positive evidence that the settlement was made in error of material facts or by fraud or undue influence.

CONTRACTS—Continued.

If there were error in the settlement, but the same resulted from the gross negligence of the party complaining, he is not entitled to relief.

The fact that one of the parties to the settlement was addicted to drunkenness will not invalidate the agreement, when it is not proved that the other party took advantage of a moment of intoxication.

Settlements are contracts.

M. Keough et al. vs. C. W. Foreman, 1434.

CONSTITUTIONAL LAW.

1. The Plaintiff's demand in this case is virtually a proceeding against the State, levelled at her property and seeking by judicial compulsion the payment of her obligations.

For this purpose, the Auditor and Treasurer have no power to stand in judgment as her agents, when she has, in her Constitution, expressed her will adversely to such payment.

Therefore the State is not represented in this action, though the same is directed against her property.

The State could not be made a party to such proceedings without her consent.

The immunity of the State of Louisiana from suit in her own courts is absolute, and cannot be encroached upon by judicial proceedings, directly or indirectly, against herself or against her agents.

The Courts of Louisiana have no jurisdiction to entertain any judicial proceeding the object of which is to enforce the performance of any contract or obligation of the State, against her will.

Those Courts have no authority to declare that a provision of the State Constitution does not express the will of the State.

Those Courts have no power to annul or disregard a provision of the State Constitution on the ground that it impairs the obligations of a contract, except when the question is presented in some suit in which the enforcement of that contract is demanded and in which it can be enforced.

Those Courts have no power to annul a provision of the State Constitution on the ground that it impairs the obligations of a contract with the State, because such a contract can never become the subject of judicial enforcement against the will of the State.

The State ex rel. S. J. Hart vs. E. A. Burke, Treasurer, et al., 498.

2. Act No. 19 of the Legislature of 1876, appropriating the sum of \$7850 for the payment of the expenses of a joint committee of the Senate and House of Representatives appointed in 1875 for the purpose of examining the books and accounts of the State Auditor and Treasurer, is violative of the Third Constitutional Amendment of

CONSTITUTIONAL LAW—Continued.

1874, which provided that the revenue of each year should be devoted to the expenses of the same year.

John Klein & Co. vs. Johnson, Auditor, 587

3. When, under the provisions of Article 132 of the Constitution of 1868 and Act No. 40 of 1869, a plantation was divided into lots of from ten to fifty acres, but, at the sale, the auctioneer announced that he would offer one lot first and that the purchaser would have the privilege of taking the other lots at the same price, and the sale was made accordingly,—the mandate of the law that such lots be sold separately, has not been obeyed, and such sale is null and void.

J. Borde vs. Widow Erskine, et al., 873.

4. Act No. 118 of the Legislature of 1869, (incorporating the Crescent City Live Stock Landing and Slaughter-House Company), was clearly within the police powers of the State, and was a valid and legal enactment of the General Assembly. 23 An., 545 ; 16 Wallace, 36.

But such an Act of the Legislature cannot bind the State: the rights therein granted are revocable at the will of the sovereign, and the grantee holds nothing, indeed, but a license subject to abrogation by future constitutional and, even, legislative action. 101 U. S., 814.

Such a charter does not create a contract between the State and the grantee, protected from impairment by the Constitution of the United States.

Article 258 of the Constitution of 1879 has clearly abrogated all the monopoly features or exclusive privileges created by said Act No. 118 of 1869.

Crescent City Live Stock Co. vs. City of New Orleans, 934.

5. Act No. 84 of the Legislature of 1878, (authorizing police juries to prohibit the sale of liquors on Sundays, in the various parishes of the State), is violative of Article 114 of the Constitution of 1868, because all the objects of the law are not expressed in its title. Said Act is, therefore, unconstitutional, null and void. Decision in 31 An. 663, overruled.

The same law is also invalid and null, for delegating to the police juries, in the manner and form resorted to, the authority of the General Assembly to legislate, and that of the State to prosecute for the commission of the offense so provided for.

State of Louisiana vs. Mrs. S. Baum, 981.

6. Under the provisions of Article 130 of the Constitution, any one of the five judges of the Civil District Court for the Parish of Orleans, has the power of issuing interlocutory orders, besides conservatory

CONSTITUTIONAL LAW—Continued.

writs, in any cause pending in said Court, in case of absence, sickness or other disability of the judge to whom such cause was originally assigned.

By the terms of the same Article of the Constitution, the judge to whom a cause has been assigned, has alone the power of rendering judgment on the merits of the case. But the Constitutional direction is not one of public order, and does not strike with absolute nullity such a judgment when rendered by any other of the five judges. The parties to the suit themselves may consent that the judgment be so rendered. Therefore, a judgment rendered by another judge than the one to whom the cause was assigned, in case writs of absence or other disability of the latter, may be valid, if no timely opposition or objection is made thereto.

The State ex rel. Buisson vs. Lazarus, judge, etc., 1425.

CORPORATIONS.

1. A corporation which, by its charter, can only act through its board of directors, cannot be bound to contracts by its president, without the authorization of the board, unless it is in acts of simple administration which, of necessity, should be done without that authorization.

George L. Bright vs. the Metairie Cemetery Association, 58.

2. The "Crescent City Rifle Club" is not a Corporation. It was organized under the law providing for the creation of Corporations for "literary, scientific and charitable purposes." The declared object of said association does not fall within the purview, the letter or the spirit, of the law relied upon. Rifle shooting is not a science, though it may be an art.

The fact that one of the Defendants, the president of said association, was not aware of the keeping of the bear on their premises, does not exonerate him from liability.

V. Vredenburg et al. vs. W. J. Behan et al., 627.

3. A corporation is entitled to have its trade-mark as well as a private individual, and may sue for its infringement.

Insurance Oil Co. vs. John H. Scott, 946.

4. A Corporation created under the laws of a sister State, has the right to sue and stand in judgment in the Courts of Louisiana.

When such a Corporation has been decreed insolvent and an assignee or trustee appointed to it, under the laws of, and in, the State where it was created, the assignee or trustee so appointed has the right to sue for the assets of the insolvent Corporation and stand in judgment in the Courts of Louisiana.

Life Association of America vs. S. Levy, 1203.

CORPORATIONS—Continued.

5. The investment of the profits of Insurance Companies in loans secured by mortgage, cannot be considered as banking business and is not prohibited by law. *Ibid.*
6. A member of a Corporation, who is a creditor thereof, has the same right as any other creditor, to sue the Corporation and attach its property. *Ibid.*

COSTS.

1. The Defendant in a suit brought by the State of Louisiana in her own courts, cannot require her to furnish security for costs.

The State vs. Succession of R. Taylor, 1270.

COUNSEL FEES.

1. A fee of \$700, for the services of Counsel in maintaining a will, which controlled the disposition of an estate of \$16,000, is not excessive.

Succession of Mrs. Ella Roth, 540.

COURTS OF APPEALS.

1. The amount in dispute being more than \$200 and less than \$1000, the Court of Appeals is commanded by Mandamus to entertain jurisdiction and try the case. Same reasons as in *Winter & Hunter vs. the Judges of the Court of Appeals of the Second Circuit*, decided at same term.

The State ex rel. Merchants' Insurance Co., vs. Judges, etc., 1070.

2. The amount in dispute in this case being more than two hundred and less than one thousand dollars, the Court of Appeals is commanded by Mandamus to entertain jurisdiction and try the case. Similar to *Lemle vs. Routon, Sheriff, et al.*, decided at the same term. *The State ex rel. Winter & Hunter vs. Judges, etc., 1096.*
3. The Court of Appeals has no jurisdiction in a proceeding of which the object is to have the inscription of a mortgage for more than \$1000 cancelled and erased from the books of the Mortgage Office, on the ground that said mortgage is simulated.

The State ex rel. Bloss vs. Judges, etc., 1351.

COURT OF APPEALS FOR PARISH OF ORLEANS.

1. A case decided by the late Sixth District Court for the Parish of Orleans, in January, 1880, in which the demand was for less than \$500, could not be appealed from to the Court of Appeals after the organization of the latter. In default of provisions in the Constitution of 1879, for an appeal under such circumstances, the judgment of the District Court was final.

The State ex rel. McGee, Snowden & Violet vs. Judges, etc., 180.

2. The Court of Appeals for the Parish of Orleans has jurisdiction of cases in which the amount involved is exactly \$1000, exclusive of interest. *The State ex rel. Widow Harper vs. Judges, etc., 358.*

CRIMINAL LAW.

1. A Motion in arrest of judgment should be denied when made on the ground, that the charge to the jury was given orally by the judge after Counsel for the accused requested it should be in writing, though the request was withdrawn before the charge was given, and though the judge had announced his readiness to grant the request.
State of Louisiana vs. Willis Hopkins, 34.

2. In a criminal prosecution for larceny, it is sufficient to lay the title of the property stolen in the ostensible or apparent owner of it. And for the purpose of such prosecution, cattle at large in the woods or prairies, must be considered as in the possession of the owner. The Proviso of Act No. 36 of 1880, allowing the State three peremptory challenges for each defendant, is unconstitutional, under Article 29 of the Constitution, because the object of the Proviso is not expressed in the title of the law.

State of Louisiana vs. William Everage, et al., 120.

3. An accomplice of the accused is a competent witness for the State even when he has pleaded guilty, if he has not yet been sentenced, and if he and the accused against whom he testifies, are tried separately.

The accused may be legally convicted on the uncorroborated testimony of the accomplice, because the jury is sole judge of his credibility.

The accused having gone to trial without objection, cannot, after conviction, object to the time when the copy of the indictment and list of the jury were delivered to him.

It is not necessary to make a separate conclusion, in each case, in a single count, in an indictment.

The concise endorsement of the character of the offense upon an information or indictment is for convenience only and forms no part of the substance of the charge, and cannot be objected to by the accused.
State of Louisiana vs. Walter Russell, et al., 135.

4. The accused being present in court during the trial, and the jury having retired and returned after a short time with their verdict, it will be presumed that the accused was also present in court at the rendering of the verdict and judgment. If, in point of fact, the accused was not present when it is presumable he was, the burden of proving his absence rests on him.

The information is not defective for duplicity because it contains a description of the manner in which the crime was committed, and, for that purpose, mentions a minor offence punishable by a different statute.

State of Louisiana vs. James Collins and Simon Kinney, 152.

CRIMINAL LAW—Continued.

5. The District Court having admitted the testimony of a convicted felon, notwithstanding the Defendant's objection, the verdict of the jury must be set aside and a new trial granted, although the objectionable witness testified he knew nothing about the case.

State of Louisiana vs. Hamp Mullen, 159.

6. Evidence is admissible of an offer to compromise made by the accused, and of the reply thereto from the prosecuting witness, when the accused was not induced by threats or promises to make the offer.

The voluntary declaration made by the accused before the committing magistrate, is admissible against him on his trial for larceny.

State of Louisiana vs. Jackson Bruce, 186.

7. An indictment for murder is not defective because it does not state the time at which the deceased died, when it states the day on which the wound was inflicted, which caused the death of said deceased. The averment is sufficient even if a number of days elapsed between the infliction of the wound and the death.

State of Louisiana vs. Fred Hobbs, 226.

8. The failure of the Record to show the presence in court of a prisoner charged with felony, at every important stage of the proceeding, is a fatal defect.

The fact that the judge repeated his verbal charge to the jury in the absence of the prisoner's Counsel, also vitiates the proceedings and entitles the accused to a new trial.

State of Louisiana vs. George Davenport, 231.

9. It is no legal ground of complaint for the accused, that the judge, in his discretion, excused some jurors of the regular venire.

When the jury of talesmen ordered by the judge is exhausted, he has the authority to order a second or third, or more, if necessary.

After the legal foundation has been established, verbal evidence is admissible of the dying declarations of the deceased.

Verbal evidence is also admissible of the statement of the deceased, that his physician informed him he was going to die.

The testimony of the sheriff is admissible to show that the accused, through Counsel, waived his right to be present in court during the trial of his Motion for a new trial.

State of Louisiana vs. John Somnier, 237.

10. Act No. 42 of 1871, providing for the punishment of "any officer or other person, charged with the collection, receipt, safe-keeping, etc., of public money, who shall convert it to his own use, etc." clearly covers the case of the Administrator of Finance of the City of New Orleans, guilty of such an act.

State of Louisiana vs. John P. Eznicios, 253.

CRIMINAL LAW—Continued.

11. It is left to the sound discretion of the District Judge to determine what time should be allowed Counsel appointed by him to defend the accused, for the purpose of preparing his defense; and also to grant or refuse an application for a continuance on that score, made on the day of trial. *State of Louisiana vs. David Wilson*, 261.

12. The accused is not entitled to a continuance on account of the absence of a witness summoned by the State.

A remark made by the judge about a witness of the State, before any of the jurors are called or empanelled, could not operate to the prejudice of the accused, and does not entitle him to a new trial.

The words of a person present during the commission of the offense, uttered at that moment, are admissible in evidence as part of the *res gestæ*. *State of Louisiana vs. Jordan Horton*, 289.

13. In a prosecution for assault with intent to commit robbery, the accused is not entitled to such a charge to the jury as, that "the evidence must show that the prisoner laid hands on the party against whom the offence was charged to have been committed, or demanded his money."

The offence may be proved in other ways.

The jury in criminal cases being the sole judges of the evidence, the accused is not entitled to the unqualified charge, that "five witnesses of good character, who are unimpeached, are entitled to greater credit than one witness who swears differently."

This Court will not review the action of the Judge *a quo*, in criminal cases, on Motions for a new trial involving questions of fact or matters resting largely within his discretion, unless the record discloses, and the Court is properly informed, that the ruling complained of was arbitrary and clearly illegal.

State of Louisiana vs. Louis Breckenridge, 310.

14. Counsel for the State, in a criminal prosecution, has the right, on the cross-examination of one of Defendant's witnesses, to ask him what "the feelings are between him and one of the State's witnesses," though nothing on this point was said in the examination in chief. The question is permissible as testing the credibility of the witness.

The judge, in his charge to the jury, in saying that the State must prove the guilt of the accused beyond all reasonable doubt, to the exclusion of every other *hypothesis*, may use the word *conclusion* instead of *hypothesis*. There is no legal difference between the two expressions. *State of Louisiana vs. Louis Willingham*, 537.

15. Copy of indictment and list of jurors have to be served on the accused two days before trial but not before arraignment. Previous Decisions affirmed.

CRIMINAL LAW—Continued.

The granting of a continuance is within the legal discretion of the Court *a quo*, with which this Court will not interfere without manifest cause.

So of the refusing of a new trial to the accused.

Arson at Common law and in this State.

It is excluded from the prescription of one year.

Accused is, under no law, entitled to a Commission to take the testimony of witnesses residing in another State.

State of Louisiana vs. Wm. M. Fulford, 679.

16. Sections 841, 842 and 843 of the Revised Statutes, providing for the punishment of the crime of arson, discussed and construed.

The indictment in this case is sufficient under said section 843, without negating the exception mentioned in the statute.

Under the order of the Court below that "witnesses for the State and the accused were to be sequestered," the accused should not have been deprived of the testimony of some of his witnesses, who were not in court when the order was made and only presented themselves the day after.

A witness of the State, on the cross-examination, having been asked what his feelings were towards the accused and having answered that they were bad and unfriendly, Counsel for the State had no right, on the re-examination in chief, to ask the witness to state the reasons of his animosity.

A witness may be examined on the cross-examination as to matters not embraced in the direct examination, when it is only for the purpose of testing his credibility. *State vs. Willingham*, 33 An. 537, affirmed. *State of Louisiana vs. Jos. Gregory et al.*, 737.

17. Act No. 98 of the Legislature of 1880, providing for the organization of the Criminal District Court for the Parish of Orleans, etc., is not unconstitutional on the score that it violates article 29 of the Constitution, which prescribes that every law shall embrace but one object, and that shall be expressed in the title.

Though the accused were charged with murder, it was permissible for a witness to state that he heard one of the Defendants say, in presence of the others, that they were going to rob the deceased. The fact that such witness was an associate of the accused may affect his credibility, but not his competency. The statement was admissible also, to prove the declarations of the accused as to a circumstance having a bearing on the question of their guilt. As all the accused were present when the declaration was made, none of them can object to the statement of the witness.

CRIMINAL LAW—Continued.

It was proper and legal, in order to show the motives of the accused for committing the murder, to admit in evidence the Inventory of the succession of the deceased, which proved that he had in his house a certain amount of money.

The Motion for a new trial, based on the ground that the evidence was insufficient to convict, cannot be reviewed by this Court, as it has no jurisdiction of the facts in criminal cases.

A Motion for a new trial, on the ground of newly discovered evidence, should not be considered by the Court, when such Motion contains no sworn-to allegation that due diligence was used to procure the same evidence on the first trial.

State of Louisiana vs. John Crowley et als., 782.

18. A juror is not incompetent when he swears on his *voir dire*, that he has formed an opinion on the guilt or innocence of the accused, but that his opinion could be overcome by the evidence, and he thought he could do justice in the case, between the State and the accused.

Error in the charge of the judge to the jury, in stating an abstract principle not arising out of the evidence and nowise relating to the cause, does not entitle the accused to a new trial.

A question, which does not appear by the record to have been raised in the proceedings in the Court below, and which is presented for the first time by the argument of Defendant's Counsel before this Court, shall not be noticed and passed upon.

State of Louisiana vs. Charles Johnson et als., 889.

19. The accused cannot complain that the list of jurors served on him, contained the names of the whole panel drawn for the term of court, including the grand jurors, &c., if said list designated those who were to serve during the week in which his case was to be tried.

The accused, having gone to trial without objection, cannot, after verdict, contest the legality of the drawing of the grand jury by which he was indicted.

State of Louisiana vs. Jerry Washington, 896.

20. The offence charged is sufficiently described in the indictment, when it is averred that the accused did *wilfully* and *feloniously* shoot and wound * * * with the intent * * * wilfully, feloniously and of his malice aforethought to kill, etc. The charge of *malice* in the shooting as well as in the intent to kill, is not indispensable.

State of Louisiana vs. Thomas Bradford, 921.

21. It is enough that the minutes of the court show that the Information was filed with the consent of the court; it needs not appear on the face of the Information itself.

CRIMINAL LAW—Continued.

When the accused has not requested the court to assign Counsel to defend him, under the statute, he cannot complain that none was assigned to him, and make it the ground of a new trial.

State of Louisiana vs. Viscounte de Serrant, 979.

22. When the Minutes of the Court do not show that the indictment was found by the grand jury and presented in open court, the verdict and judgment must be set aside and a new trial granted to the accused.

This case presents a glaring instance of an imperfect and incomplete record, to the detriment of the public interest.

It is not sacramental that the prisoner should be asked if he has anything to say why sentence should not be pronounced; and the absence of this formality will not vitiate the proceedings.

It is no sufficient ground for a challenge for cause that, in answer to the question of the District Attorney, the juror said he had some prejudice against convicting on circumstantial evidence.

State of Louisiana vs. Jake Shields, 991.

23. This Court cannot review a verdict and judgment of the court below, on the ground that Appellant is charged in the indictment with having committed the offence on the 19th of March, 1880, and the evidence shows that the offence was committed on the 19th of March, 1881. Were this Court to review such evidence to ascertain whether the averment in the indictment was or was not properly sustained by the proof, it would be trying the case on appeal as to the facts.

State of Louisiana vs. H. Polite, 1016.

24. The Record showing that the District Attorney, with leave of the court, filed the indictment, etc., the legal presumption is that the leave of court was first obtained.

The Record showing that the accused was in court when his trial commenced, the burden of proof is on him to establish that he was not present at the rendering of the verdict, if such were the fact.

It is competent for the District Court to have its Minutes corrected *nunc pro tunc*, before they are approved, to show the proceedings as they really and truly took place.

State of Louisiana vs. S. L. Cox, 1056.

25. Evidence of the dangerous character of the deceased, in a charge of murder, is not admissible in justification of the accused, on account of threats and hostile demonstrations made by the deceased prior to, and disconnected from, the time of the killing, unless followed by some assault or hostile demonstration on the immediate occasion of the killing, tending to produce upon the mind of the ac-

CRIMINAL LAW—Continued.

cused the impression that he was in instant danger, which could only be averted by the killing of his adversary.

State of Louisiana vs. Henry Jackson, 1087.

26. The Clerk of court and two jury commissioners, forming a quorum under the law, the *venire* drawn by them will not be considered illegal for want of the presence of the other two commissioners.

The refusal of the judge to grant a continuance to the accused to procure certain witnesses, was, under the circumstances of the case, within his sound discretion.

A juror is competent, though he answered upon the direct examination, that he had formed an opinion respecting the guilt or innocence of the accused, if, on examination by the judge, it appears from his answers that his opinion was formed from rumors, that he is without bias or prejudice, and that he can decide the case according to the evidence, without regard to what he previously heard.

State of Louisiana vs. E. Hornsby, 1110.

27. Under the circumstances of this case, justice required that a continuance and reasonable time to procure the attendance of his witnesses, should be granted the accused. The refusal of the same by the court *a qua*, entitles him to a new trial.

An indictment charging larceny in one count, and receiving stolen goods in another, is valid; but under a single count charging larceny, a conviction of receiving stolen goods cannot be maintained.

State of Louisiana vs. G. Moultrie, 1146.

28. The certificate of the Clerk of Court from which a case is transferred, in a change of venue, attached to the copy of the original proceedings, such as the indictment, arraignment and plea, etc., not being stamped with the seal of the Court, is clearly inadmissible in evidence on the trial of the accused in the Court to which the case has been transferred.

The introduction on the trial of legal evidence of such proceedings had before the change of venue, being indispensable, the trial, verdict and judgment are illegal and must be set aside, and a new trial granted to the accused.

State of Louisiana vs. H. J. Brown, 1151.

29. The accused, under the charge of larceny, having waived the trial by jury, and, after being tried by the Court and found guilty, having obtained a new trial, has the right *then* to change his former election and claim to be tried by the jury.

State of Louisiana vs. W. Touchet, 1154.

30. Under Sec. 1056, Revised Statutes, the verdict of the jury is good, though omitting the words: "not guilty of embezzlement",—and containing only the words "guilty of larceny".

CRIMINAL LAW—Continued.

Under the same section, the information is sufficient in charging the accused with embezzlement as "agent" merely.

State of Louisiana vs. H. R. Poland, 1161.

31. In an indictment for perjury, it is indispensable to aver before which Court or authority the offense charged was committed, and also that the officer who administered the oath to the accused, was competent to do so.

State of Louisiana vs. S. Harlis, 1172.

32. The description of the thing stolen, in an information for larceny, being: "One hog, the property of A. B.," is sufficient.

Act No. 35 of 1880, providing for the trial of offenses in certain cases, has only one object set forth in its title and is constitutional.

It is competent for the Legislature to change the manner of criminal trials regardless of the time of the commission of the offense, without redering the act in which such change is made, obnoxious to the Constitution.

State of Louisiana vs. H. Carter, 1214.

33. The verdict of the jury is not vitiated by the fact that it is signed by the foreman, without the usual addition of "foreman," appended to his signature.

An indictment is not bad because it contains two counts charging the accused, in one, with severing certain produce from the soil of another person, and, in the other, with stealing said produce. The two offenses are of such kindred nature that they may be charged in the same indictment.

But the indictment is defective in only charging that the article severed from the soil was part of a crop "produced" by A. B., &c. The averment of *ownership* of the soil from which the produce was severed, is indispensable under the statute.

State of Louisiana vs. M. Sheppard, 1216.

34. The provision of the Constitution that the accused in criminal prosecutions shall have the right to be tried by a jury, does not prevent said accused from waiving the jury and electing to be tried by the court only.

Act No. 35 of 1880, providing for the trial of offenses in certain case, is not repugnant to any article of the Constitution.

The Court *a qua* justly refused the application of the Defendant for a new trial, based upon the ground of newly discovered evidence and accompanied by the affidavit of the person who was stabbed by the accused, stating that he, (the accused), was drunk at the time of the assault and did not know what he was doing.

State of Louisiana vs. J. White, Jr., 1218.

35. The Judge of a District Court has no right to refuse leave to the District Attorney to file an information, on the ground that, in his

CRIMINAL LAW—Continued.

opinion, the statute under which the prosecution is instituted, is unconstitutional.

[*The State ex rel. Hall, District Attorney, vs. Judge, etc.*, 1222.

36. Under section 790, Rev. Sta., "thrusting" a person may well include thrusting with "an iron bolt, rod or pin," whether the point be sharp or not.

State of Louisiana vs. D. Lowry, 1224.

37. Under the present Constitution, the accused in criminal cases, in which the punishment of death or imprisonment at hard labor *may* be inflicted, is entitled to an appeal to this Court, whether the verdict of the jury or judgment of the lower court is or not for a lesser punishment. Similarity on this point between the Constitutions of 1852 and 1879, and difference with that of 1868. 14 An. 649.

The State ex rel. Gabriel vs. Judge, etc., 1227.

38. The accused had the right to prove by a competent witness, that another person, accused with him of having stolen a hog and convicted on a separate trial, had asked him just before the time of the alleged offense, "to go and help him to get his hog." The circumstance was part of the *res gestæ*, and the evidence admissible to show the absence of the *animus furandi*.

State of Louisiana vs. T. Dellwood, 1229.

39. The accused has the right to waive the constitutional provision of the trial by jury and elect to be tried by the Court. Decision in *State vs. White*, just rendered, affirmed.

It is not necessary that the Parish in which the offense was committed, should be named in the body of the indictment. The law provides that it is sufficient that it should be named in the margin of that instrument.

The Record showing that the prisoner was *formally* arraigned, the legal and necessary inference is, that he was *present* at the arraignment.

In cases not capital, it is not indispensable that the prisoner be asked if he has anything to say why sentence should not be pronounced. Affirming *State vs. Taylor*, 27 An. 393.

The presence of the accused during the trial is sufficiently shown by the Record. *State vs. White*, also affirmed in this particular.

State of Louisiana vs. H. Askins, 1253.

40. It is not material, in a prosecution for larceny, that the Information should state the exact day of the commission of the offense, provided the proof shows that it was committed within one year of the filing of the Information. This is not an open question any longer.

Nor is the allegation of ownership of the thing stolen material in cases of larceny. Affirming decision in 33 An. 120.

State of Louisiana vs. W. Kane, 1269.

CRIMINAL LAW—Continued.

41. The accused having pleaded not guilty upon a first arraignment and, upon trial, the jury not agreeing and being discharged, a second arraignment took place, when the accused pleaded guilty and was sentenced by the Court; *held* that the proceeding was legal and that no formal withdrawal of the first plea of not guilty was necessary.

It is no more an open question in Louisiana that, in an Indictment under a statute providing a punishment for the commission of a common law offense, it is insufficient to charge the offense in the statutory terms alone, but all essential averments in an Indictment at common law for the same offense are necessary. Therefore, forgery being a common law offense, not defined in our statutes, and a felony at common law, the omission of the word *feloniously* in the Indictment vitiates the proceeding.

State of Louisiana vs. J. H. Flint, 1228.

42. An indictment is not bad for duplicity, in charging conjunctively in the same count, both an offense and the intention of committing the same, when the two are denounced disjunctively in the statute. This is not an open question any longer.

State of Louisiana vs. T. Richards, 1294.

43. In a trial for murder, proof of threats made by the deceased against the accused, is not admissible when the threats were not communicated to the latter.

State of Louisiana vs. T. Fisher, 1344.

44. When a venire has been regularly drawn, the failure to summon a juror, resulting from mere mistake or error on the part of the officer, without fraud or collusion, and without material injury to the accused, is no sufficient cause to quash the panel.

State of Louisiana vs. Joe Dozier, etc., 1362.

45. It affords no ground of challenge to the array, that the names of deceased and incompetent persons were placed in the box, or drawn therefrom. The accused can only take advantage of it by a challenge to the poll. The incompetency of one of the Grand Jurors cannot be urged by the accused after he has pleaded to the indictment and been convicted, in the absence of averment and proof that he, (the accused), only knew of the incompetency after trial and conviction.

State of Louisiana vs. J. Wittington, 1403.

46. A venire drawn by a majority of the Jury Commission, in the absence of a member who has not yet qualified, is legal and regular.

State of Louisiana vs. A. Wells, 1407.

47. In a criminal prosecution where two defendants are jointly on trial, the State is entitled to six peremptory challenges for each twelve

CRIMINAL LAW—Continued.

challenges to which such defendants may be entitled. Act No. 24 of 1878 is not unconstitutional and governs this point.

The presence of the accused in court is not necessary during the filing, trial and disposition of a motion for a new trial. Previous Decisions affirmed. *State of Louisiana vs. N. Green et al.*, 1408.

48. The law provides no delay for arraignment after indictment or information, and the accused is required to plead when arraigned, which is his only time as of right.

The excusing of a juror by the Court, even if the latter committed an error in so doing, cannot be taken advantage of by the accused. *State of Louisiana vs. Jake Shields*, 1410.

49. Alleged errors or irregularities in the drawing of jurors cannot invalidate the panel, unless fraud has been practiced or some great wrong committed.

A juror, charged with an offence, such as assault and battery, not punishable by hard labor, is not incompetent.

The appointment of the foreman and the verdict itself may both be verbal.

The verdict being written: "guilty of manslaughter," for manslaughter, is valid.

The sentence is legal though the accused was not asked by the Court if he had any thing to say why it should not be passed. Previous Decisions affirmed. *State of Louisiana vs. W. Smith*, 1414.

CURATOR AD HOC.

1. The terms Curator *ad hoc*, Attorney *ad hoc* and Advocate, when used with respect to an absent defendant, all equally indicate the person appointed by the Court to defend him, and no real distinction exists between them.

Neuville Bienvenu vs. Factors' and Traders' Insurance Co., 209.

2. The Curator *ad hoc* appointed to represent an absent defendant, having in his answer prayed for a fee to be taxed in his favor, and, on the trial of the case, evidence having been offered to show the value of the Curator's services, contradictorily with the plaintiff, the judgment rendered in favor of the defendant and taxing the Curator's fee, shall be binding on the plaintiff for the payment of said fee. No special notice of the trial of the Curator's claim for said fee needs be given under such circumstances.

Mrs. M. F. Bowie vs. S. M. Davis, 345.

3. A Curator *ad hoc* of a minor cannot waive citation.

Julie Cormier, Adm. vs. T. De Valcourt, Admr., 1168.

DAMAGES.

1. On the mere *quantum* of damages, this Court will not disturb the judgment of the Court below, unless the amount is manifestly excessive or clearly unsupported by evidence.

Hugo Redwitz vs. E. Waggaman, Sheriff, et al., 26.

2. Case of contributory negligence on the part of the injured party. Re-affirmance of the principle, that the party inflicting the injury is not liable in damages, in such cases, even if he is also at fault.

Gabriel Childs vs. New Orleans City Railroad Company, 154.

3. Punitive or vindictive damages on account of a suit by injunction alleged to have been brought through malice and without probable cause, shall not be granted without clear and positive proof of the malice and want of probable cause.

The dissolution of an injunction is *prima facie* evidence of an injury sustained by the party enjoined, and entitles him to actual damages.

E. Conery et al. vs. Temple S. Coons et al., 372.

4. The fact that defendant in a suit for damages for malicious prosecution, acted under the advice of Counsel, is no excuse if the advice was given upon his misrepresentations of the circumstances of the case.

The admission or proof that such defendant is an upright and honest man, incapable of making a false oath, is not inconsistent with the charge of malice.

Malice may be inferred from the total want of probable cause.

Probable cause means reasonable ground of belief, supported by circumstances sufficiently strong to warrant a cautious man in that belief, that the accused is guilty of the offense charged.

The prosecutor may have been honest, and may have actually believed in the truth of the affidavit made by him, and yet be liable for damages, if he acted without reasonable cause.

Valmont Decoux vs. Pierre Lieux, 392.

5. The doctrine of contributory negligence should not be carried to the point of holding the injured party not entitled to damages, on account of acts of his employees, which are not connected with their employment.

The responsibility of persons who keep ferocious animals is of such strict and grave character as not to be relieved or modified by the ordinary considerations which regulate claims for damages. The very keeping of such animals is an unlawful act and, therefore, the injury done by them when they get loose, gives rise to an action for damages under all circumstances.

When persons sued to be made liable for their acts, seek to escape such liability by pleading some privilege or immunity in derogation

DAMAGES—Continued.

of common right, they must clearly establish the existence of the same, and bring themselves strictly within the provisions of the law on which they rest such claim.

The charge of the judge *a quo* to the jury, that "damages can be claimed by the heirs of the deceased for the loss of his life," is clearly erroneous. A number of adjudications of this Court declare that no such action lies in favor of the heirs. The Act of 1855, amending Article 2315, C. C., expressly limits their right to such action as the deceased himself would have had for damages had he survived the injury.

V. Vredenburg et al. vs. W. J. Behan et al., 627.

6. Malice may be inferred from want of probable cause for the arrest of a debtor, and, therefore, needs not be proved, though the presumption is subject to rebuttal.

It is only where there exists a probable cause and the arrest is effected under the advice of learned Counsel, consulted in good faith and on correct information of the facts, that a party can be exonerated from damages on the plea that he acted under legal advice.

Simon Block vs. Meyers & Levy, 776.

7. In an action for slander, it is not necessary to prove any special damage suffered by the Plaintiff, when the language used against him by the Defendant, is in itself libellous.

Moses Lobe vs. George W. Cary, 914.

8. The mere fact that the accused, under a criminal prosecution, has been acquitted, does not entitle him to damages against the prosecutor; and he should recover none, when the evidence shows that there was a probable cause for the prosecution, and no malice on the part of the prosecutor.

J. A. Godfrey vs. T. and L. Soniat, 915.

9. Under the provisions of the Relator's Charter, as well as the Code of Practice, this Corporation can be sued for trespass, out of his domicile and in the Parish in which the trespass has taken place.

The word *trespass*, used in the Charter of the Company was employed by the Legislature in its broadest sense, so as to comprehend a variety of wrongs, whether direct or indirect, in which force was used, and not in the technical sense of the Common Law term.

The legal distinction between *trespass* and *trespass on the case* cannot be made in the premises.

The Company may be sued for damages for the killing of a mule, in any parish in which the act was done.

The State ex rel. Morgan's R. R. Co., vs. Judge, etc., 954.

DAMAGES—Continued.

10. This Court will not disturb the verdict of the jury as to the amount of damages found by them, in a case where the appreciation of such damages is essentially within their province.

W. J. Buford vs. C. M. Tidwell, 1053.

11. A party may allege fraud in his pleadings, in a civil suit, for the purposes of his case, without thereby rendering himself liable in damages for slander, when he has made the charge in good faith, without malice and under a state of things from which the fraud could reasonably be inferred. The authorities on this point reviewed.

Benito Vinas vs. Merchants' Insurance, 1265.

12. Charges of dishonesty against the Parish Attorney made in good faith and in the discharge of their official duties by members of the Police Jury, do not render them liable in damages for libel.

J. Fisk vs. L. Soniat et al., 1400.

13. The sheriff, and not the seizing creditor, is answerable for damage suffered by property under seizure, when the latter is not charged with privity.

E. Latiolais, Adm. vs. Citizens' Bank, 1444.

DEPOSIT.

1. A claim for the recovery of an irregular deposit is only prescribed by ten years.

Money received by the wife as a deposit, with the knowledge and consent of the husband, constitutes a debt of the community, for which he is liable.

J. P. Cousins vs. H. L. Kelsey and Wife, 880.

2. The Bank of Commerce sent to the Southern Bank for collection three checks on other banks in New Orleans. They were collected and the proceeds passed to the credit of the Bank of Commerce in its *general* account, as it had given no instructions for any special disposition of the money, but, on the contrary, drew against the proceeds of those checks, as an ordinary depositor. On the same day that the checks were collected, the assets of the Southern Bank were seized by the Sheriff, and Receivers were appointed. The Bank of Commerce claims in this case the *restitutio ad integrum* of the proceeds of its three checks. *Held* that this bank was an ordinary depositor of the Southern Bank; that the proceeds of the three checks were mixed with its general funds, and the Bank of Commerce is no more than an ordinary creditor.

The State ex rel. Girardey vs. Southern Bank; Bank of Commerce, Opponent, 957.

DOMICIL.

1. A Defendant, sued out of the Parish of his domicile, may legally ap-

DOMICIL—Continued.

pear and stand in judgment. Decisions in 31 An. 88; 30 An. 595, and 29 An. 194, affirmed.

In an action of nullity of judgment on the ground that Defendant was sued out of his domicile, the record showing that the judgment was not rendered on default, and there being no evidence before this Court to establish that Defendant did not cure by appearance and plea the illegality of citation, the presumption of *omnia rite acta* must prevail and the judgment must stand.

J. A. Stevenson vs. Whitney, Tax Collector, et al., 655.

2. An action brought against a District Attorney to have his office declared vacant, on the ground that he has changed his residence and has none in the State, is a suit against him in his personal capacity, and not in his official character, in as much as he is alleged to have ceased to be district attorney. The suit must, therefore, be brought in the parish in which he resides or resided last, under the provisions of the Code of Practice, and cannot be brought indifferently in either of the parishes composing the district of the office.

The State ex rel. Eagan, Attorney General, vs. Hiram R. Steele, 910.

- 3 Difference between domicile and residence.

Ibid.

DONATIONS INTER VIVOS.

1. An onerous donation, when the value of the thing given does not exceed by one-half that of the charge imposed, is not subject to the rules prescribed for donations *inter vivos*; and an action for its dissolution must be governed by the rules relating to ordinary contracts.

Therefore, as in a suit for the rescission of a contract, in which the plaintiff must put, or offer to put, the defendant in the same position in which he was before the contract, in the case of an onerous donation, the donor or his representative, who seeks the rescission of the donation, must offer to return what he has received from the donee, as a condition precedent of the suit.

E. N. Pugh, Executor, et al. vs. Mrs. Mary J. Cantey et al., 786.

2. The donation made by the father to the common child, out of the community property, will be considered as made by both husband and wife when, after the father's death, the mother accepts the community. Previous Decisions affirmed.

V. H. Dickson and husband vs. H. P. Dickson et als., 1370.

DONATIONS MORTIS CAUSA.

1. When a testator, after bequeating by his will a certain claim against his debtor, exchanges with the latter the original evidence of the debt for his bond or other evidences of indebtedness, the legacy is not revoked by implication, under the Code of Louisiana.

Succession of Patrick Irwin, 63.

DRAINAGE TAX.

- 1 The claim of the City of New Orleans on an alleged judgment *in personam* for drainage taxes, against a person whose succession was opened in the Second District Court for the Parish of Orleans, was properly before said Court for recognition, classification and payment by the Executors.

Such a judgment is only prescriptible by ten years from its rendition. Act No. 30 of the Legislature of 1871 could not constitutionally, under the title of "An Act to provide for the drainage of New Orleans," provide for the creation of a new drainage District and still less for the institution of *extraordinary proceedings* to coerce payment of drainage taxes. The title of that Act was not indicative of such and other objects of the statute.

Judgments obtained by the summary proceedings provided for, in that law, are null and void. *Succession of Patrick Irwin*, 63.

ELECTIONS.

1. The Courts have undoubtedly the right to inquire into, and pronounce upon the validity of the returns of election.

As decided by this Court in the case of *Duson vs. Thompson*, 32 An., 861, irregularities in election returns do not *per se* vitiate the election; and in default of such legal returns, extrinsic evidence should be resorted to, in order to ascertain and decree the real result of the election.

The sworn officers charged by the law with the returns of election, are presumed to perform their duties with fidelity and honesty, and this presumption can only be overcome by positive evidence and not by mere suspicion of fraud.

H. McKnight vs. A. V. Ragan, 398.

ESTOPPEL.

1. Creditors, who accept a voluntary assignment from their debtor, or the latter's property, at a certain appraised value, much exceeding the amount of their claims, are estopped, in the absence of error or fraud, from afterwards alleging the insolvency of the debtor at the moment of the assignment.

Such creditors are, therefore, precluded from bringing the Revocatory action against the said debtor and his vendee of some property not included in the assignment.

Liquidators of Hart & Hebert vs. A. H. Huguet et al., 362.

2. A vendor, who has agreed with the vendee that the latter would assume the payment of certain obligations as part of the price of sale, is not allowed to plead the nullity of those obligations in a petitory action brought by said vendee, in which he claims title to the property sold.

Harris Jaffa vs. M. O. Myers and husband, 406.

ESTOPPEL—Continued.

3. The sureties of the cashier of a bank who, in the very bond signed by them, recognized the legal existence of that corporation, are estopped from denying that the bank had such legal existence at the date of the bond.

Teutonia National Bank vs. J. M. Wagner et al.

4. Estoppel must be specially pleaded.

Heirs of Wood vs. Joseph Nicholls, 744.

5. Appellee cannot be estopped from denying the appealable character of a suit, because consent cannot vest this Court with jurisdiction.

J. W. Smith vs. Merchants' Insurance Co., 1071.

6. The school board of the Parish of Union could not in accepting the accounts of their treasurer, allow him certain charges in violation of law. Their action was *ultra vires* in that respect, and not susceptible of ratification. The settlement made and discharge granted by them, under such circumstances, is not conclusive and may be assailed and set aside, at the suit of their successors in office, under charges of error and fraud. And the ex-treasurer cannot set up the plea of estoppel, under the facts of the case.

School Board vs. J. E. Trimble, 1073.

7. A party is not estopped by its pleading when the averment was made without knowledge of the real fact underlying the controversy,—especially when that real fact was within the knowledge of the adverse party.

L. B. Watkins vs. J. D. Cawthorn, 1194.

8. The judicial averments of a married woman, in her suit against her husband, of the sums received by him from her father for her account, estop her from afterwards disputing such sums in a partition suit between her co-heirs.

V. H. Dickson and Husband vs. H. P. Dickson et al., 1370.

9. One contracting with a Corporation is thereafter estopped from denying its corporate existence, unless it is for causes that occurred since the contract.

E. Latiolais, Adam., vs. Citizens' Bank, 1444.

EVIDENCE.

1. City Ordinances, differently from Acts of the Legislature, must be proved, as they cannot be judicially taken notice of.

The issue between the parties being the constitutionality and legality of the City Ordinance imposing a license-tax upon Attorneys-at-law, and there being no evidence of the Ordinance in the Record, the Appeal must be dismissed.

City of New Orleans vs. C. D. Labatt, 197.

2. An endorser who does not specially deny his signature on a note,

EVIDENCE—Continued.

will be considered as having admitted it, under the rule of Article 2244, C. C.; and the Plaintiff is dispensed with the necessity of proving it on the trial of the case.

Union National Bank vs. Succession of Thomas B. Lee, 301.

3. Judicial records cannot be impeached or contradicted by verbal evidence. *Mrs. L. L. Mann vs. B. L. Mann*, 351.

4. The Congress of the United States had no power to enact rules of judicial proceedings and evidence for the trial of causes in the State courts, and, to that effect, to declare that no written instrument should be received in evidence unless it were stamped. The Decision in *Pargoud vs. Richardson*, 30 An., 1286, affirmed.

Widow A. Holt et al. vs. Liquidators of Hart & Hebert, 673.

5. After introducing in evidence, without any qualification, the certificate of the medical examiner, Defendant should not be permitted to impeach its integrity or assall the correctness of its statements.

A strong *prima facie* case made out by Plaintiff, cannot be defeated by conflicting evidence.

Susan S. Maclin vs. New England Life Insurance Co., 801.

6. Oral evidence is inadmissible to prove the promise of a person to furnish his signature on negotiable paper to another party, when the purpose of the evidence is to show that such person is liable for the debts of said other party by virtue of the promise.

R. W. Rayne & Co. vs. Richard Terrell, 812.

7. A juror cannot be heard disclosing his own improper conduct and impeaching his own verdict.

J. A. Godfrey vs. T. and L. Soniat, 915.

8. After the State has closed its case and the accused declined to offer any evidence, the Court may, within its legal discretion, permit the State's Counsel to call and examine other witnesses.

State of Louisiana vs. Walter Rose, 932.

9. A private statute should be offered in evidence on the trial of a suit, and cannot be judicially noticed. Affirming Decision in 28 An. 415.

A written act, purporting to be a transfer of all the rights of an association, and signed by parties, who therein pretend to be the sole members of such association, will not enable the assignee to stand in judgment, in default of accompanying proof that the assignors were really members and sole members of the said association.

Workingmen's Bank vs. G. T. Converse et al., 963.

10. Oral evidence is admissible to show and correct an error in the description of real estate, contained in the act of sale of the property.

EVIDENCE—Continued.

The fact that the vendee afterwards claimed the property, under the erroneous description, from the vendor's estate, does not estop him from proving such error by verbal evidence.

M. Levy vs. Mrs. V. A. Ward, Adm., 1033

11. The rule of evidence in Louisiana, differently from that established by the Supreme Court of the United States, is that a witness, on the cross-examination, may be interrogated upon matters unconnected with those upon which he was examined in chief. Previous Decisions affirmed.

Simulation, from its nature, can, usually, be proved only by indirect and circumstantial evidence; and when facts are shown, which are sufficient to throw doubt upon the reality of the sale, the burden of proof is shifted to the parties who know the truth and can establish it by their testimony.

When, under such circumstances, they fail to furnish the evidence clearly within their power, all the presumptions of law are against them.

Such *prima facie* case of simulation, if the parties charged with it do not even attempt to rebut it by their own testimony, will be conclusive and sufficient to set aside the transaction complained of.

H. D. King, Adm., vs. William T. Atkins et al., 1057.

12. When Defendant could, by his own testimony, prove the existence of a certain fact, which is particularly to his own knowledge, and he fails to do it, the presumption is against him that the fact does not exist.

When both parties have announced that their evidence is closed, the court, in its discretion, may grant to either party the *privilege* of introducing further proof, but it is not a *legal right*, that can be claimed as such.

When an attempt is made to discredit a witness by showing that he made a contradictory statement on a previous occasion, it is not sacramental that the exact time of the alleged contradictory statement should be designated; it is enough that sufficient reference is made to the circumstances that attended the statement, and to the statement itself, so as to place the witness fully on his guard.

Testimony is admissible to prove the sworn statement of a deceased witness, made in a previous suit between the same parties, when said statement does not contradict the official acts of the deceased witness.

School Board vs. J. E. Trimble, 1073.

13. Acts of baptism are public acts, which require no proof of their

EVIDENCE—Continued.

genuineness; and certified copies of them, made by their proper custodians, are admissible in evidence as well as the originals.

Succession of Mélodie Hébert, 1099.

14. When an attempt is made to discredit a witness by showing that he made a contradictory statement on a previous occasion, it is not sacramental that the exact time of the alleged contradictory statement should be designated; it is enough that sufficient reference be made to the circumstances that attended the statement, and to the statement itself, so as to place the witness fully on his guard. *School Board vs. Trimble, ante page 1073.*

State of Louisiana vs. Wade Hampton, 1252.

15. The rule established in article 326, C. P., debarring a defendant who has denied his signature, from every other defense, does not apply to a partner denying the firm's signature executed by another partner. *Affirming 29 An., 546.*

Mutual Nat. Bank vs. J. P. Richardson et al., 1312.

16. The rule of exclusion of the husband's testimony against his wife, C. C. 2281, applies only during the existence of the marriage. This question is settled by previous decisions.

Succession of Josephine Hale, wife of Ames, 1317.

17. The deposition of a witness taken at the inquest before the Coroner is admissible in evidence, in behalf of the accused, on the trial of the case, when the witness has died since the inquest.

State of Louisiana vs. John McNeil, 1332.

EXECUTORY PROCESS.

1. Defendant in executory process is not entitled to an injunction without bond under Article 739, C. P., on the ground that the obligation sued upon was null and without consideration *ab initio*.

On the trial of the suit, in which an injunction was issued without bond, no evidence is admissible in support of allegations other than those containing any of the reasons for the injunction as are enumerated in Article 739, C. P.

Damages cannot be allowed in the same judgment which dissolves an injunction in a case of executory process. *Affirming Decision in Testard vs. Belot, 33 An., (not reported), which re-affirmed 31 An., 729, and 32 An., 932 and 1296.*

W. J. Hodgson vs. Mrs. Ella Roth and husband, 941.

2. If the mortgage creditor is entitled to executory process against his mortgagor, he has the same right against the vendee of the latter, even if his act of mortgage does not contain the pact *de non alienando*, but, in that case, he must proceed, as against third possessors,

EXECUTORY PROCESS—Continued.

by the hypothecary action proper, after the thirty days demand and ten days notice provided for by the Code of Practice. And the fact that such mortgage creditor has obtained judgment against the original mortgagor, does not deprive him of the right of executory process, in the hypothecary action, against the mortgagor's vendee

M. A. Montego vs. Gordy, Sheriff, et al., 1113.

3. The Citizens' Bank may proceed by seizure and sale to collect the contributions due by a stockholder. Affirming 25 An. 628.

E. Latiolais, Adm., vs. Citizens' Bank, 1444.

HOMESTEAD.

1. Parties claiming the benefit of the Homestead law, must disclose and establish a clear case within its purview.

Widow Caroline Tilton vs. Joseph Vignes et al., 240.

2. Sect. 1691, Rev. Sta., which provides for a homestead in favor of the debtor having a family or mother, or father or persons "dependent on him for support," means persons dependent for *actual* and *necessary* support, and not persons able to earn a living. A debtor supporting persons of the latter class, is not entitled to the exemption of the homestead.

Widow Lenfroy Decuir vs. Benker, Sheriff, et al., 320.

HUSBAND AND WIFE.

1. It is not incompatible with the wife's personal and sole administration of her paraphernal property, that she would employ her own husband as her agent for the purpose of that administration.

When the paraphernal property is thus administered by the husband, as agent of his wife, by virtue of a special and express power of attorney, and his administration is clearly and positively in her name, for her own account, and subject to her control and authority, the fruits of the property belong to her and not to the community.

[Note of the Reporter]: The property in this case was a plantation situated in the State of Mississippi.

The wife has the right to buy property for her separate account, partly for cash and partly on credit, when she pays the cash portion of the price with her paraphernal funds, and has revenues derived from her paraphernal property, sufficient to pay the credit portions of the price when they become due.

The property thus bought by her is paraphernal.

General principles laid down by the Court to show when and how the wife may buy property for her separate account, on credit.

Mrs. Mary E. Miller, wife of W. L. Jackson, vs. Handy, Sheriff et als., 160.

HUSBAND AND WIFE—Continued.

2. The wife has no mortgage on the property of the husband to secure a donation *propter nuptias* made to her by himself. Re-affirming the Decision of *Gates vs. Legendre*, 10 Rob. 74.

Vincent T. Cambre, etc. vs. Félicité Grabert et al., 246.

3. A creditor of the husband, holding a mortgage on property transferred by the latter to his wife in payment of her paraphernal rights, has no reason to contest the legality of the transfer, inasmuch as the property is transferred subject to the mortgage of the creditor, towards whom the wife is then in the position of a third possessor.

There is no legal objection to the husband's transferring to his wife, in payment of her paraphernal rights, property encumbered with a mortgage, because the wife takes the property subject to the mortgage, without assuming the debt of her husband.

The insolvency of the husband is no legal obstacle to the transfer made by him to his wife in satisfaction of her paraphernal claims, and, in that respect, such transfer is not subject to the rules which govern the revocatory action. There is no difference to be made whether the transfer takes place after judgment of separation, or without such judgment. Previous decisions affirmed.

Mary E. Levy, executrix, vs. Daniel Morgan et al., 532.

4. It is settled that the recompense due by the separate estate of the wife for improvements placed thereon, during marriage, at the expense of the community, is the enhanced value resulting to her separate estate from the improvements, at the date of the dissolution of the community. If the improvements be added by the husband out of his separate funds, under the same circumstances the recompense due him by the separate estate of the wife must be settled by the same rule, as there is no difference in principle between the two cases.

It is a perfectly equitable mode of fixing that enhanced value, to make an average of the valuations placed by all the witnesses on the land and improvements together and on the same separately.

Succession of Mrs. Ella Roth, 540.

5. When the wife, in a suit against her husband for a separation of property, asserts that certain property, acquired in her name, during the existence of the community, was bought with paraphernal funds and is her separate property, the presumption of law is against her and she must rebut it by legal evidence to establish her title.

The declarations of her husband and of herself in notarial acts, that he received various sums of money for her, and that the purchases

HUSBAND AND WIFE—Continued.

made in her name were paid for with her own funds, are no legal evidence of such facts, so far as third persons are concerned.

Louise A. De Sentmanat, wife, etc., vs. Nelvil Soulé, 609.

6. A judgment of separation of property and dissolution of the Community, rendered after citation to the husband, duly published and followed by an execution, and subsequently and uniformly recognized by both parties thereto, in many acts and proceedings, cannot be set aside at the suit of the heirs of the husband, upon uncertain and verbal evidence. *Heirs of Compton vs. F. L. Maxwell, 685.*

7. The husband may make a transfer of his property to his wife, in payment of her legal claim against him, whether she has a mortgage or not; and his insolvency is no obstacle to such settlement, as the law contemplates his very financial embarrassment as the reason of the transfer, which is, therefore, not subject to the rules of the Revocatory action. Decision in *Levi, Executrix, vs. Morgan et al., 33 An. 932, affirmed.*

The right that the wife had against her husband for such transfer, her heirs have after her death, and the *dation en paiement* of transfer can equally be made to them; but the debt which it is proposed to satisfy, must be a real one, properly evidenced. Therefore, the *dation en paiement* made by the father to his children in payment of their rights, as heirs of their mother, in the Community, will be set aside in favor of creditors of that Community, if the same has not been liquidated. *M. U. Payne vs. P. H. Kemp et als., 818.*

8. In default of proof of the husband's financial embarrassment, the wife, suing for a separation of property and recovery of paraphernal rights, should be nonsuited.

Eliza P. Hendricks, wife, vs. T. Wood, husband, 1051.

9. The wife having obtained a judgment of separation of bed and board against the husband and a decree ordering the sale of the Community property for the purpose of a partition of the proceeds between them,—and the husband having enjoined the execution of the decree and failed in his injunction suit; *quære*: can the wife, in the partition of said proceeds, claim rent of the Community property enjoyed by the husband during the injunction, and her Counsel fees? *Held*, that she cannot and must prefer such claim on the injunction bond. *Barbara Beopple vs. B. P. Green, 1191.*

10. A *dation en paiement*, made by a partner to his own wife, of the property of the firm, in satisfaction of her claim against the firm for her paraphernal funds held by it, is legal and valid.

J. Murrell et al. vs. Mary E. Murrell et al., 1233.

HUSBAND AND WIFE—Continued.

11. The husband cannot claim from the estate of his deceased wife, payment of a contract formed between her and him during marriage.
Succession of Josephine Hale, wife of Ames, 1317.
12. The husband is not entitled against his deceased wife's estate to remuneration for services rendered to her during marriage. *Ibid.*
13. A disguised donation from the wife to the husband, is not reducible to the disposable portion, but is absolutely null and void. *Ibid.*

INJUNCTION.

1. A party who bases his right to an Injunction on Article 303, C. P. must show: either that he has a *right of property* in the thing, or the act sought to be enjoined, would, if done, give him a right to damages. *Michael J. McAdam vs. John S. Rainey et al., 108.*
2. The order of court dissolving an injunction on bond, may work an irreparable injury and is appealable, when the act enjoined, as alleged, amounts to a trespass, and the effect of dissolving the injunction would be to change the possession of immovable property, Affirming previous decisions.
State of Louisiana ex rel. Edward Sigur vs. Judge, etc., 133.
3. An Injunction does not lie to restrain a municipal Corporation from passing an Ordinance. The Petition of Plaintiff applying for the Injunction discloses no cause of action.
Wm. C. Harrison et al. vs. City of New Orleans et al., 222.
4. In a suit by injunction, there being a reconventional demand by the defendant, and the merits of the case being properly put to issue by the pleadings, the defendant, in obtaining the dissolution of the injunction, on the trial in the absence of the plaintiff, is entitled, not merely to a judgment of nonsuit, but to one that should be conclusive between the parties, and if not appealed from, should constitute *res judicata*.

It is only in suits by injunction restraining the execution of a money judgment, that the defendant can obtain in the same decree the dissolution of the injunction and damages.

The prayer for general relief would in no case warrant a judgment for damages against the surety on the bond, when none are asked against him. *Pierre Verges vs. Gonzales, Sheriff, et al. 410.*

5. When the writ of injunction was not clearly abused, the defendant, on its dissolution, is only entitled to counsel fees in the way of damages. *Heirs of Stafford vs. Henry Renshaw, 443.*
6. Pending a suspensive appeal from an order dissolving an injunction on bond, the injunction itself remains in full force and its restraining effect should not be, in any manner, impaired by any subsequent action of the lower Court.



INJUNCTION—Continued.

A counter-injunction in the meantime should, therefore, not be granted and is an invasion of the appellate jurisdiction of this Court, and, in the premises, an indirect disobedience of its mandate ordering the original injunction to be re-instated.

A Mandamus lies to compel the lower Court to grant a suspensive appeal from its order dissolving on bond another injunction taken by the original plaintiffs in injunction and other parties, for the same restraining purposes.

And a Prohibition lies to prevent said lower Court from permitting the execution of the order to bond and from violating in other manners the original injunction, during the suspensiv appeal from the order dissolving the same on bond. 32 An., 1192.

The State ex rel. Gravois et al. vs. Judge, etc., 760.

7. The sworn allegation of Plaintiff in injunction, that the act to be enjoined will cause irreparable injury, is not conclusive of the fact and does not deprive the judge who granted the injunction, of all discretion in dissolving it on bond.

Crescent City Live Stock Co. vs. Butchers' Union, etc., 930.

8. A party against whom executory process has issued, cannot enjoin it, on the ground that the property seized does not belong to him.

Union Bethel Church, etc., vs. Civil Sheriff et al., 1461.

9. Damages cannot be allowed in the same decree which dissolves an injunction in cases of executory process. Previous Decisions affirmed.

INSURANCE.

1. The failure of the insured, to make certain returns of all produce consigned to them and to pay premiums thereon, as stipulated by the underwriter, vitiated and avoided their contract of insurance in the premises.

There was no waiver of the right of forfeiture, on the part of the insurer under the circumstances of the case.

E. C. Palmer & Co. vs. Factors' and Traders' Insurance Co., 1336.

INTERVENTION.

1. An Intervenor, not having prayed for citation against Plaintiff, is no party to the latter's suit and cannot offer evidence on the trial of the case.

Chism & Boyd vs. Thomas Ong et al., Chubbuck, Intervenor, 702.

INTRUSION INTO OFFICE LAW.

1. In a proceeding under the Intrusion into Office law, at the instance and on the relation of a private individual, the first inquiry is: Has the Relator a *muniment of title* to the office held by the Defendant?

INTRUSION INTO OFFICE LAW—Continued.

If he has not, and only contests the rights of the Defendant, without exhibiting an apparent title in himself, the proceeding must fall. The object of that law, which provides for a summary proceeding to test the superiority of the respective titles of the Relator and the Defendant, to an office, was not to embrace cases in which no *prima facie* title, such as a commission, a judgment, or a return of election, can be produced by office claimants.

The law in question was not intended as a substitute for the law providing for and regulating the contestation of elections, and has not repealed the same.

The State ex rel. J. T. Ford vs. Ernest Miltenberger, 263.

2. The Intrusion into Office Act is yet in force, and unrepealed or unaffected by any provision in the Constitution of 1879.

In proceedings under that Act, the failure of the State to appeal does not prevent any other party in interest from doing it.

Whilst this Court will not compel the Attorney General by Mandamus to take and bring up an appeal in the name of the State, still that officer cannot bind the State by acquiescence in a judgment adverse to her. A mere allegation of acquiescence, contained in a motion to dismiss, unsupported by affidavit, does not justify the remanding of a cause for the purpose of having the question as to acquiescence tried in the lower court.

The State ex rel. Howell, District Attorney, etc., vs. Echeveria, Sheriff, et al., 709.

JOINT PROPRIETORS.

1. An agreement between Plaintiffs and Defendant, entered into in December, 1873, by which the latter was to pay the former, as part of a certain compromise between them, the sum of \$600, as their half of the rents for the year 1873 of a plantation belonging jointly to the parties, does not constitute a lease and cannot be the basis of the tacit reconduction for subsequent years.

The joint proprietor of a plantation who cultivates half of it for his own account, without preventing his co-proprietor from occupying and cultivating the other half, is not liable to the latter for rent of the common property. Affirming decision in *Beenel vs. Beenel*, 23 An., 150.

Heirs of J. D. and H. B. Balfour vs. L. G. Balfour, 297.

JUDGE DE FACTO.

1. A prisoner arrested by virtue of the *mittimus* of a committing magistrate, cannot, in an application for a *habeas corpus*, raise the question of the legality of said magistrate's title to office, when the latter is the regular incumbent *de facto*, acting and presiding over a tribunal of recognized legal existence and competency.

The State ex rel. H. Williams vs. Constable, etc., 1411:

JUDGMENT.

1. Interest cannot be collected on a judgment for money, which, by its terms, is silent as to interest.

A judgment is not a debt within the meaning of Article 1938, C. C.

Succession of Robert Anderson, 581.

2. A money judgment, rendered by a court of original jurisdiction in a sister State, against one who was at the time the Executor of the debtor in that and in this State, said judgment being subsequently affirmed by the Supreme Court of that State contradictorily with an Administrator *de bonis non*, appointed to represent the estate,—can be made the cause of an action in this State.

Such judgment, in the suit brought upon it in this State, is not conclusive of what it decrees and, on the contrary, it is open to all the defenses which can be legally opposed to judgments, but it is a sufficient legal cause to institute an action upon.

T. W. Turley vs. Dreyfus, Executor, 885.

3. A judgment simply dismissing the demand of an intervenor, on the ground that he was not present or represented at the trial of the cause, cannot support the plea of *res judicata*.

The terms of the judgment itself should govern, and not the statement of the judge made in relation to it in some other proceeding, that there was a clerical error in said terms.

C. T. Bourg vs. C. H. Gerding et al., 1369.

JUDICIAL SALES.

1. Unless the sheriff, in offering property for sale at public auction, announces, after reading the mortgage certificate, that the purchaser shall have the right to retain the amount of the anterior mortgages and privileges, there can be no valid adjudication.

But the nullity is susceptible of ratification.

Southern Mut. Insurance Co. vs. Mrs. Mary A. Pike et al., 823.

LAND OFFICE.

1. Certificates of purchase from the Land-Office, made in accordance with law, operate an equitable severance of the land from the public domain and constitute sufficient evidence of title, when accompanied with possession, to form the basis of the prescription of ten years, against the holder of a patent issued subsequently to the acquisition of said prescription.

Edward J. Gay vs. Thos. H. Ellis, 249.

LAWS.

1. The same rules of construction apply to State Constitutions and to the Acts of the Legislature.

In order that a statute should be retroactive, the intention of the law-

LAWS—Continued.

giver in that respect must have been expressed in clear and unambiguous terms.

City of New Orleans vs. Julien Vergnole, 35.

2. Under the Constitution of 1868, several objects might be contemplated in a statute, but each object must have been expressed in its title.

Laws in derogation of common right must be strictly construed and not extended beyond their precise terms.

Of this character are those laws which are designed to substitute a summary mode of procedure to the ordinary rules of practice.

Constitutions are to be interpreted in the same manner and according to the same rules as Statutes.

Succession of Patrick Irwin, 63.

3. A Statute is not unconstitutional as a whole, under the Constitution of 1868, because all its objects are not expressed in its title. Those parts of the law, which are indicated by the title, must stand, while only those not so indicated will fall, unless they are so interwoven with, and dependent upon, each other, that they cannot be separated.

State of Louisiana vs. John P. Exnicios, 253.

4. It is beyond the province of this Court, in construing Articles 575 and 624, C. P., (formerly Act of 1843), to strike out of the statute the word "an" and insert in lieu thereof the word "no" without positive proof of the error, furnished by the original enrolled bill.

Louise A. De Sentmanat, wife, etc., vs. Nelvil Soulé, 609.

5. Section 3784 of the Revised Statutes, which provides for the punishment of the State Treasurer by fine, etc., for refusing to pay warrants in certain cases, upon conviction thereof, etc., means a conviction under a regular criminal proceeding. Such conviction is a condition precedent, under the Statute, to the recovery of the penalty.

A. L. Tissot vs. A. Dubuclet et al., 703.

6. A law may be broader than its title and not be unconstitutional. Such portions of the law as are not expressed in the title, are null and void, and the rest is valid.

State of Louisiana vs. John Crowley et als., 782.

7. Act No. 39 of 1873, is not unconstitutional on the the score of its title.

W. H. McGregor vs. R. W. Allen, 870.

8. Act No. 121 of 1880, Sec. 6, providing that " * * * no bond shall be stamped until the said January coupon shall have been surrendered to the Treasurer or Agent," is violative of the Constitutional Ord

LAWS—Continued.

nance, in imposing additional requirements for the stamping of the bonds, and, to that extent, it is inoperative.

The State ex rel. Ecuyer vs. E. A. Burke, Treasurer, 969.

9. The laws of other States can have no extra-territorial effect in this.
Life Association of America vs. S. Levy, 1203.

LESSOR AND LESSEE.

1. Plaintiff, as lessee of a lot of ground, and Defendant as lessor of the same, agreed that the latter, at the expiration of the lease, would pay the former for buildings and improvements constructed by him on said lot of ground, a price to be determined by "two disinterested persons, one to be chosen by each, etc."

Held that such an agreement is the law of the case between the parties, and, in the absence of a charge of fraud against the so constituted experts, this Court will not disturb their finding.

Hermann Graf vs. Samuel Friedlander, 188.

2. The tenant of a predial estate cannot claim an abatement of the rent, under Article 2743, C. C., on account of an overflow of the Mississippi River. Such an event is not one of the accidents of extraordinary nature that could not have been foreseen by the parties. Decision in 16 An., 162, affirmed.

Mrs. M. J. Jackson, Adm. vs. W. C. Michie et al., 723.

3. An unrecorded act of lease of real estate produces no legal effect as to third persons.

The lessee of immovable property, under an unrecorded lease, is liable to the seizing creditor for rent accruing after seizure, though he has paid it to the lessor by anticipation, or furnished negotiable notes for it.

The lessee of immovable property, under an unrecorded lease, in case of seizure, has the right to claim the dissolution of the lease; but, if he remains in possession, a tacit reconduction results from it in favor of the seizing creditor.

Decision in 30th An., 436, affirmed.

W. F. Anderson vs. C. Comeau, 1119.

4. The lessee must suffer necessary repairs to be made during the existence of the lease and is not justified in abandoning the premises on that score.
G. M. Murrell vs. Jackson & Manson, 1341.
5. A lease of property granted by the usufructuary expires when the usufruct ceases, whether such termination is caused by the death of the usufructuary, or by a judgment of court decreeing the loss of the usufruct for abuse.

V. H. Dickson and husband vs. H. P. Dickson et als., 1370.

LESSOR AND LESSEE—Continued.

6. The failure of the lessor to make necessary repairs, does not afford the lessee a legal reason for not paying the rent, or sustain a claim for the damage suffered by his furniture from the bad condition of the leased premises,—when the rent is sufficient to enable the said lessee to make the repairs himself. Previous Decisions affirmed.

This principle is equally applicable when the lessee has furnished rent notes, if they are still in the hands of the lessor.

Mrs. B. Lewis et als. vs. Widow J. F. Pepin, tutrix, 1417.

LICENSE TAX.

1. Foreign insurance companies taking risks through insurance agencies or insurance brokers in the City of New Orleans and issuing policies from their own domicils, are not subjected to the Ordinance of the City of New Orleans, which imposes a license tax of five hundred dollars on insurance companies incorporated in another or a foreign State and doing insurance business in said City by an agent. Decision in 31st An. 781, affirmed.

City of New Orleans vs. Foreign Insurance Companies, 10.

2. Article 206 of the Constitution, providing that "No political corporation shall impose a greater license tax than is imposed by the General Assembly for State purposes," was not intended to act retroactively.

The Constitution took effect from and after the first day of January 1880.

Article 206 does not, therefore, affect the legality of the License ordinance of the City of New Orleans, No. 6253, passed on the 23rd of December, 1879, under the laws then in force, and imposing certain municipal license taxes.

City of New Orleans vs. Julien Vergnole, 35.

3. No municipal Corporation in the State can impose a greater License for the sale of alcoholic or spirituous liquors than is imposed by the General Assembly, on the ground that it is a police regulation. Article 170 of the Constitution in no manner controls, or even relates to, Article 206.

The State ex rel. Daniel Lemle, vs. Chase, Tax Collector et al., 287.

4. The license tax imposed by the City of New Orleans on keepers of private markets, does not violate the Constitutional rule of equality and uniformity in taxation, though no license tax at all is imposed upon the sellers of meat, vegetables and other articles, in the public markets of the City.

City of New Orleans vs. John Dubarry, 481.

5. Article 206 of the Constitution does not affect the legality of the License ordinance of the City of New Orleans, No. 6253, passed on

LICENSE TAX—Continued.

the 23rd of December 1879, under the laws then in force, and imposing certain municipal license taxes. Decision in *City of New Orleans vs. Vergnole*, 33 An. 35, affirmed.

The Administrator of Finance of the City of New Orleans has no authority to reduce in some particular cases the amount of the license tax fixed by the city ordinance.

City of New Orleans vs. C. Meister, 646.

6. The Ordinance of the City of New Orleans, imposing a license tax upon the owners of towboats running on the Mississippi river to and from the Gulf of Mexico, does not impose a duty upon tonnage; nor is it a regulation of commerce. Such Ordinance is not, therefore, in conflict with the provisions of the Constitution of the United States on these points. The authorities on the subject are reviewed at length in the Decision.

Nor is the same Ordinance obnoxious to the restrictions of the State Constitution of 1879. Decision in *City vs. Vergnole*, 33 An. 35, reaffirmed.

City of New Orleans vs. Eclipse Tow-Boat Company, 647.

LIFE INSURANCE.

1. A policy of insurance taken on the life of the husband in favor of the wife, vests the latter with a right, which the former cannot destroy or control without her consent.

Such a policy belongs to the wife exclusively, and not to the Community of acquets and gains. Previous Decisions affirmed.

Therefore, the insurer, having at the request of the husband and without the consent and knowledge of the wife, substituted to such a policy, one in favor of the husband, will remain liable to the wife on the original policy for the amount thereof, less the sums of premiums paid on the substituted policy.

And the insurer will also be liable to the transferee of the substituted policy, because he is estopped from denying its legal and independent existence, having been instrumental in inducing innocent third persons to give value for it, by issuing it and representing it to the world as an original policy in favor of the husband, and consenting to its transfer.

Mrs. A. M. Pitcher vs. New York Life Insurance Co., 322.

2. A policy of life insurance will be annulled when the insured made misrepresentations to the insurer as to his habits of intemperance, although he may himself, in making the declaration, have been in good faith and not have intended to commit a deception.

Hartwell, Agent, etc., vs. Alabama Gold Life Insurance Co., 1353.

LITIGIOUS RIGHTS.

1. The sale of Plaintiffs' interest in the land sued for in a petitory action, for a fixed price and without warranty, is the sale of litigious rights, and the vendee being the sheriff of the court in which the suit is pending, such sale is null and void. The fact that the suit is still carried on, after the transaction, in the name of the original Plaintiffs, does not prevent the nullity.

C. C. Duson, Curator, vs. L. Dupre et al., 1131.

MANDAMUS.

1. The Petition for a Mandamus must be sworn to, as required by Art. 840, C. P., and the omission of the Petitioner's oath cannot be subsequently cured by means of a supplemental Petition.

State of Louisiana ex rel. Fisk vs. Police Jury, etc., 29.

2. The duty of the Treasurer to stamp the bonds, as required by the Ordinance of the Constitutional Convention of 1879, is purely ministerial, and he should be compelled by Mandamus to perform it.

The State ex rel. Ecuyer vs. E. A. Burke, Treasurer, 969.

3. The petition for a Mandamus needs not be in the name of the State. It is only the Writ that must be issued in the name of the State. And the prayer of such Petition being for an *Order commanding*, etc., is equivalent to a prayer for a *Manâamus*. The word is not sacramental.

The State ex rel. Dardenne, President, etc., vs. Judge, etc., 1356.

MANDATE.

1. A special power of attorney to prosecute a claim, does not empower the agent to defend and stand in judgment in a suit brought by the debtor for damages for slander and libel.

A. L. Gusman et al. vs. L. DePort et al., 333.

2. A general insurance agent, with authority to solicit and receive applications for insurance, has no power to accept such applications and bind his principal by stating to the applicant that the risk attached at a certain moment.

G. W. Stockton vs. Firemen's Insurance Co., 577.

MARRIED WOMEN.

1. A married woman may legally bind her paraphernal property for the purpose of liberating her husband from jail, and when she has done so in contracting with third persons in good faith, she is not allowed to deny her obligation on the ground of the marital influence and coercion.

Such a defense is a fraud, for the perpetration of which the law will not lend her the aid and relief which it extends to married women against the abuse of the marital power.

Harris Jaffa vs. M. O. Myers and Husband, 406.

MARRIED WOMEN—Continued.

2. A married woman, who has bound herself, with the marital authorization, towards an innocent third person, as surety of a party between whom and her husband there exists a secret partnership, cannot plead that she has, by her contract of suretyship, assumed to pay her husband's debt, and thereby exonerate herself from her obligation. To sustain such a defense, would be to convert the laws intended for the protection of married women, into a system of legalized deception and fraud.

Bank of Lafayette vs. Mrs. E. J. Bruff, 624.

3. The wife may, after the death of the husband, ratify the act by which she had bound herself for his debt, during his lifetime.

The nullity of such an act is only absolute in this sense, that she cannot ratify it as long as she is under the marital influence.

When the wife has ratified such an act after the death of the husband, the ratification is retroactive, and renders the act valid from its original date.

Therefore, creditors who only became so subsequently to its date, cannot attack the validity of the ratified act.

Charles Lafitte et al. vs. Widow E. R. Delogny et al., 659.

4. The administrator of a married woman's succession has the right to show, without pleading fraud and injury, that an obligation contracted by her during her lifetime and upon which her estate is sued, was for the purpose of paying her husband's debt, and, therefore, null and void.

John Chaffe, Bro. & Son vs. Oliver, Adm., 1008.

5. A married woman, separated in property and administering her own affairs, is liable on her note, without proof that it enured to her individual benefit.

Julie Cormier, Adm., vs. T. DeValcourt, Adm., 1168.

MINORS.

1. The Court of ordinary jurisdiction has the power to entertain to final consummation the executory proceedings against a minor's property. *Soye vs. Price, 30 An., 93, reaffirmed.*

An inventory of the minor's property, as a pre-requisite to a partition, is not indispensable when there is only one piece of property to be partitioned.

Property held in common with a minor and sold under a judgment in a partition suit, may be sold regardless of appraisalment.

When property, in which the natural tutor has an undivided share, is sold to effect a partition, there is no law of the State which authorizes the referring of the legal mortgage of the minor to the proceeds of the sale. The mortgage shall remain attached to the undivided portion of the property which belonged to

MINORS—Continued.

the tutor, until the removal of it by means of the special mortgage provided for by law, or the extinction of it by settlement of the minor's rights at his majority. The purchaser, in the meantime, takes the property subject to the minor's mortgage, and retains in his hands the price of the tutor's share.

Lecarpentier vs. Lecarpentier, 5 An., 497, affirmed.

Life Association of America vs. G. L. Hall, 49.

2. The process-verbal of the family meeting advising the purchase of real estate for a minor, is not a sufficient warrant for the tutor, if not homologated by the Court, and the purchase, in that case, does not bind the minor.

The subsequent approval and homologation of the tutor's account, in which the purchase is charged to the minor, cannot validate the act of the tutor done without legal authority.

The taking of possession by the minor at his majority, of the property thus purchased, is no ratification of the act of the tutor, unless an account of the tutorship with the vouchers, as required by law, has been previously rendered to him.

The minor, emancipated by marriage, has only a power of administration over her property.

When a tutor has been also administrator over the succession of his ward's parent, he cannot in rendering his account of tutorship, engraft upon it the homologated account of his administration of the succession. The latter is not binding upon the minor.

Succession of Antoine Mitchell, 353.

3. The special mortgage furnished by the natural tutrix in favor of her minor children, does not destroy, but merely restricts the previous legal mortgage.

H. M. Isaacson vs. P. H. Mentz, et al., 595.

4. Minors, whose property was sold without legal authority, can recover it without tendering the price of sale to the purchaser.

They are not estopped from revindicating the property because, in the partition of their father's succession, at their majority, they received the proceeds of such sale, when they were not informed of the fact connected therewith. Their action, under such circumstances, cannot be considered as a ratification of the sale.

They have ten years after their majority, during which they are in time to revindicate the property.

The purchaser of the property sold in such case is not entitled to an offer of restitution of the price, as a condition precedent of the revindication, but he may claim the amount in reconvention.

The law does not consider the fact that a purchaser did not examine

MINORS—Continued.

into the titles by which his vendör acquired the property as an evidence of bad faith.

The purchaser may be one in good faith, though his vendor acquired the property in bad faith.

Heirs of Self vs. B. F. Taylor, 769.

5. The rule, in computing certain legal delays, that neither the day of notice nor that on which the act is to be done are included, does not apply to Article 361, C. C., which provides that agreements between tutors and their wards arrived at the age of majority are null, unless preceded by a full account and vouchers rendered ten days previous to the agreement.

W. J. Hodgson vs. Mrs. Ella Roth and husband, 941.

6. Sale of minors' property by order of Probate Court on advice of family meeting.

R. C. Wisenor vs. R. H. Lindsay, 1211.

7. The rule that a tutor can act as administrator of his ward's parents' estate as long as creditors do not object, is re-affirmed in this instance.

Under the circumstances of the case, the action of the tutor, in the Motion to revive, is maintained pending the application for the appointment of the administratrix.

The State ex rel. Jones vs. City of Shreveport, 1247.

MORTGAGE.

1. A mortgage is not negotiable like the note it is intended to secure, but on the contrary, passes into the hands on the transferee subject to all the equities and defenses which existed between the original mortgageor and mortgagee.

Pierce Butler vs. Mrs. Cora A. Slocomb, 170.

2. A. B. and C. are owners undividedly of lots of ground 1, 2 and 3.
D. has a mortgage with the pact *De non alienando* on the one undivided third interest of C. in the three lots.
A. B. and C. partition the three lots among themselves, and lot 3 is assigned to C.
C. puts a mortgage upon said lot 3 of which he has become sole owner. E., the holder of this mortgage, forecloses it and buys in said lot 3 at sheriff's sale.
D. takes a judgment against C., seizes and sell his one undivided third interest in the three lots and buys it in, ignoring the previous adjudication to E.
D. then brings a partition suit against A. and B. averring their respective one undivided one-third interest in the three lots; and he, in the same suit, has E. cited, and prays for judgment against him decreeing he has no title to lot 3.

MORTGAGE—Continued.

In answer to the partition suit, A. and B. admit the title of D., as alleged by him.

Held : that the pact *De non alienando* availed D. in executing his judgment against C., as well as if he had proceeded to foreclose his mortgage by executory process ; that D. had the right to cite E., in the partition suit, to defend the title he lay to lot 3; that *quoad* E., the suit is petitory and he must establish his title; that *quoad* A. and B. the suit is for a partition and their title is averred by the plaintiff and needs not be established ; that the original extrajudicial partition between A. B. and C. did not affect the mortgages upon their respective undivided interests ; that when C. gave a mortgage to E. upon lot 3, it only affected his one undivided third interest in said lot, and when E. foreclosed his mortgage and bought in, he only acquired that one undivided third interest, and only got a title defeasible by the pact *De non alienando* of D.: that E. therefore, has no title to lot 3.

Neville Bienvenu vs. Factors' and Traders' Insurance Co., 213.

3. A mortgage upon a plantation attaches to the *batture*, which is formed in front of the said plantation subsequently to the act of mortgage.

The seizure and sale of the plantation, at the suit of the mortgage creditor, carries with it the seizure and sale of the *batture*, as part of the property mortgaged, seized and sold, and the said *batture* passes with the plantation to the purchaser.

Wm. W. Hollingsworth vs. John & Charles Chaffe, 547.

4. The owner of concurrent mortgage notes, who has assigned some of them for value, has no right to compete with his transferee in the proceeds of the mortgaged property, if they are not sufficient to satisfy the claims of both. This is well established in our jurisprudence.

The fact that, in endorsing and transferring the notes, he stipulated he was not liable for the same, makes no exception to the rule.

The principle is equally binding upon him, if he made a gratuitous donation of the notes to a person, who afterwards assigned them for value.

Abney & Co. vs. Wm. E. Walmsley, 589.

5. The stipulation in an act of sale, that the amount paid by the vendor to insure the property sold, in case the purchaser neglects to do it, shall be secured by privilege on the property, has no legal effect whatever, as privileges can only be created by law and not by the agreement of parties.

MORTGAGE—Continued.

And the stipulation in the same act of sale, that said premiums of insurance shall be secured by mortgage upon the property, is equally of no avail to the vendor, if the amount and rate of insurance are not fixed in the act. The mortgage in such case is not for an *exact* sum, as required by law, and is, therefore, invalid.

The pact *De non alienando* in an act of mortgage does not prevent a subsequent purchaser of the property mortgaged, from contesting the very validity of the mortgage itself. Such purchaser has acquired the property subject to the pact, provided the mortgage is real and valid; but if it is not, the pact is itself of no effect.

State of Louisiana vs. Citizens' Bank, 705.

6. A mortgage creditor with the pact *De non alienando* may disregard the seizure of the mortgaged property made by a junior mortgagee, and proceed by seizure and sale in another court.

The mortgage creditor with the pact *De non alienando* may ignore subsequent transfers of the property and proceed *via executiva* against the original mortgagor; but, if he choose to sue such subsequent vendees, instead of the original mortgagor, he must proceed, as against third possessors, by the hypothecary action proper, and not *via executiva*.

Michael Troendle vs. O. De Bouchel, 753.

7. Mortgage creditors, ruled into court to show cause why their mortgages should not be erased, on the ground that the mortgaged property was judicially sold to effect a partition,—have the right to show and urge the nullity of the sale.

J. Borde vs. Widow Erskine et al., 873.

8. The title by which the holder of a mortgage note sought to acquire the mortgaged property, being annulled, confusion and extinguishment cease and the mortgage still exists.

W. B. Spencer vs. Goodman & Bradfield et al., 898.

9. A subsequent mortgagee has no interest in the question whether an antecedent mortgage was or not properly re-inscribed, when the property upon which said antecedent mortgage rested, was sold and the purchaser assumed the mortgage as part of the price of sale, and the act of sale was recorded before the alleged peremption of the said antecedent mortgage. The holder of such vendor's privilege will necessarily outrank the subsequent mortgagee, whether the said assumed mortgage is or is not perempted.

Plaintiff's demand comes within the purview of the Revocatory action, to which, under the facts of the case, the prescription of one year applies.

Mr. and Mrs. Cante vs. L. B. Cain et al., 965.

MORTGAGE—Continued.

10. A mortgage, which has not been recorded, ceases to have any effect after ten years, *even between the parties to the contract.* C. C. 3369
Charles Tilden, President, &c., vs. Succession of C. H. Morrison, 1067.
11. It was contended in this case that the mortgage granted by the Defendant on her right, title and interest in certain property, was null and void, because she was a widow in community and the property an asset of an unliquidated community, in which she had only a residuary interest, which was not mortgageable. *Held* by the Court, without in any manner deciding whether such an interest is or not mortgageable, that, in the premises, the mortgagor appeared in the act of mortgage as any ordinary individual, not as widow in community; that she mortgaged such interest in the property as she might have, not her interest as widow in community, and that, therefore, the objection to the validity of the mortgage is not tenable.
M. L. Dickson vs. H. P. Dickson, 1244.
12. The interest of the widow in community is residuary and can only be ascertained and defined after a settlement of the community. It follows, therefore, that mortgages granted by her before the liquidation of the community, cannot affect her obligation, upon the extinguishment of her usufruct, to account to her co-proprietors, and cannot prejudice the rights of the latter upon the entire mass of the community.
V. H. Dickson and husband vs. H. P. Dickson et als., 1370.
13. A mortgage granted by a stockholder of the Citizens' Bank, to secure the amount borrowed by him, needs not be re-inscribed.
E. Latiolais, Adm. vs. Citizens' Bank, 1444.

MUNICIPAL BONDS.

1. The Supreme Court of the United States, in the recent case of *Meriweather, Receiver of Memphis, vs. Garrett et al.*, has not reversed or modified the principles previously recognized in repeated Decisions, that where a statute authorized a municipal corporation to issue bonds and to exercise the power of taxation to pay them, and persons bought said bonds, this power of taxation is part of the contract, and cannot be withdrawn until the bonds are paid. This Decision in the Memphis case closely examined.
B. Saloy et al. vs. City of New Orleans, 79.
2. Municipal bonds issued in pursuance of legislative authority and negotiable in form, are not subject to equities as to consideration or otherwise, in the hands of a *bona fide* holder for value before maturity.

Act No. 69 of the Legislature of 1861, authorizing the Town of Donaldsonville to issue the bonds sued upon in this case, and the law of 1853, now section 2448 of the Revised Statutes, prohibiting police

MUNICIPAL BONDS—Continued.

juries and incorporated towns and cities to contract debts without providing the means of paying them, are not inconsistent, and the later enactment did not repeal the previous one. Therefore, the Town of Donaldsonville is only bound on said bonds to the extent of the provision made for the payment of the same, by the levy of an annual tax of \$1000 on the real estate of said town, during ten years.

The objection raised by Defendant, that such a tax is not uniform, and, therefore, is unconstitutional, is not tenable. The point fully examined.

Justilien Oubre vs. Town of Donaldsonville, 386.

3. It was a sufficient consideration for the bonds sued upon, that they were issued in settlement, by compromise, of outstanding claims against the municipal corporation, which had enured to the latter's benefit, and which were believed by the municipal authorities and the creditors to be valid and exigible.

The legality of those original claims cannot be examined in an action on the bonds issued in execution of such compromise.

Widow V. Dugas vs. Town of Donaldsonville, 668.

MUNICIPAL CORPORATIONS.

1. The right exists in the Council of a municipal Corporation to determine what, in its nature and use, it deems a *nuisance*, and to direct its removal or discontinuance under the penalties which it is, by legislative authority, empowered to impose or inflict. 10 An., 227.

City of Monroe vs. J. Gerspach, 1011.

NEW ORLEANS.

1. Judgments against the City of New Orleans, which are made inexecutable by law, cannot be compensated against. If they were compensable, they would be executory.

W. B. Schmidt et al. vs. City of New Orleans, 17.

2. The City of New Orleans cannot be compelled to accept ten mills in full payment of the city taxes of 1880, under the limitation fixed by Article 209 of the Constitution of 1879.

The power of taxation possessed by said City is not confined to that granted by that Constitution.

Her power of taxation required to meet her antecedent contract obligations, is not derived from, or controlled by, the State Constitution. It was derived from valid legislative authority existing at the time of such contracts, which formed part of them, and, therefore, rights acquired under them are protected by the Constitution of the United States, independently of the will of the State.

It was not the intention of the Constitution of 1879 to deprive the City

NEW ORLEANS—Continued.

of the right to apply such portion of the ten mills to the support of the city government as might be necessary, and thereby throw her into a state of anarchy.

The Decision in *Shields vs. Pipes*, 31 An., 765, a parallel case, commented upon and affirmed.

B. Saloy et al. vs. City of New Orleans, 79.

3. Act No. 74 of the Legislature of 1880, "To authorize the City of New Orleans to fund its floating debt, &c.," is not unconstitutional on the ground, that it is a local and special law passed in violation of Article 48 of the Constitution, because, if a local and special law, it is taken out of the operation of this prohibition by Article 250 of the same Constitution.

Nor is said Act No. 74 violative of Article 29 of the Constitution, which provides, that every law shall embrace but one object, and that shall be expressed in the title.

But, as said Act No. 74 only authorizes the funding of the *valid* indebtedness of the City of New Orleans, it does not comprise that part of its floating debt, amounting to about \$1,000,000, contracted between the 2d of November, 1874, and 1st of January, 1880, in violation of the Constitutional Amendment of 1874, which prohibited the said City from increasing its debt in any manner or under any pretext whatever, and of issuing warrants for the payment of money except against cash actually in the treasury.

At the same time that that portion of the floating debt of the City, cannot be funded by virtue of said Act No. 74, yet the holders of such claims have vested rights upon the uncollected revenues of the City for the respective years in which the obligations were contracted; and, inasmuch as Act No. 74 affects those vested rights, it is unconstitutional.

Tax-Payers' Association et al. vs. City of New Orleans et al., Conroy, Intervenor, 567.

NEW TRIAL.

1. It was clearly within the power of the lower court, in the exercise of a sound discretion, to set the judgment aside, before signature, and grant a new trial. And that sound discretion was properly exercised in a case like this, in which interrogatories propounded under garnishment proceedings to a municipal Corporation, were not answered and were taken *pro confesis*, owing to the excusable oversight of its Mayor.

A. Marchand vs. Noyes et al., 882.

2. The question of diligence in procuring evidence is essentially of the province of the court below on an application for a new trial, and this Court will not interfere with the discretion of the District Judge in that respect.

State of Louisiana vs. T. Fisher, 1344.

NOVATION.

1. A mortgage creditor may treat as his debtor the vendee of the mortgaged property, who has assumed payment of the debt, without thereby creating a novation and discharging the original debtor. That discharge cannot be presumed, and must be established by clear and positive proof of such intention on the part of the creditor. In default of sufficient evidence to the contrary, it will be presumed that the creditor retained the old debtor at the same time that he accepted the new one.

E. Latiolais, Adm., vs. Citizens' Bank, 1444.

PARTITION.

1. Property acquired by an heir at a partition sale, and paid for by means of his heritable share, is his separate property, and does not fall into the Community of acquets and gains, as property acquired during marriage.

This vexatious question fully discussed and examined, and the authorities reviewed.

Difference between the text of the Code of 1808 and that of the Code of 1825.

Decisions in cases of *Hache vs. Ayraud, 14 An. 178*, and *Breaux vs. Carmouche, 15 An. 588*, overruled in that respect.

H. D. Troxler et al. vs. Colley, Sheriff, et al., 425.

2. When the wife, owning in her own right an undivided half of certain property, buys the whole of said property at a partition sale, one-half will be yet her separate property, but the other half will fall into the Community, unless she shows by proper evidence that she paid for it with her paraphernal funds.

Louise A. De Sentmanat, wife, &c., vs. Nelvil Soule, 609.

3. Grand-children, coming to the partition of their grand-father's estate, when their own father *died before* their said grand-father, are not bound to collate what their father received before his death, because they inherit in their own right, and not by right of representation. C. C. 1240. Re-affirming Decisions in 4 N. S. 557 and 23 An. 290.

N. M. Calhoun et al. vs. S. D. Crossgrove et al., 1001.

4. In a partition suit, the heirs of age have an absolute right to demand a sale for cash for their shares of the common property.

V. H. Dickson and Husband vs. H. P. Dickson, et als., 1370.

PARTNERSHIP.

1. A partnership between stevedores is not a commercial, but only an ordinary, partnership, and parties taking the promissory note of such a firm, do it at their peril, if the partner who issued the note, had no authority from his co-partner to do so.

W. S. Benedict et al., Executors, vs. Thompson & Torjusen, 196.

PARTNERSHIP—Continued.

2. The certificate of the Recorder of mortgages stating that an act of partnership *in commendam* was registered in the mortgage office, in a certain book, on which the number and folio are given, there arises a legal presumption that the registry was made in the manner prescribed by law, especially when no attempt has been made to disprove the truth and correctness of said certificate.

A partner *in commendam* may have with the firm he is thus connected, all the business transactions which a stranger could have, without thereby taking part in the affairs of said firm and rendering himself liable for its debts.

R. W. Rayne & Co. vs. Richard Terrell, 812.

3. Defendant was a member of a planting partnership, to which he made advances for the raising of a crop on a plantation belonging to the co-partners. The other partner died during the partnership: Plaintiff was appointed Curator of his estate and was authorized by Probate Court to continue the cultivation of the plantation. To this Curator Defendant rendered an account of his advances and sale of the crop, and paid over one-half of the net profits. The Curator accepted the account and received the money; but subsequently claimed one-half of the gross proceeds of the crop, in order to distribute the same under order of the Probate Court, and pay defendant ratably as a creditor of the estate. *Held* that the Curator was concluded by his acceptance of Defendant's account and receipt of the money, and that the settlement between them was final.

M. Dowling, Curator vs. H. Gally, 893.

4. A partnership from which the parties have excluded some of their respective property, is not an universal partnership under our Code. An act of universal partnership must be registered in the Mortgage office, and the registry is necessary, *even between the parties*, to give such character to the partnership.

A partner who, in violation of the act of partnership, enters into another firm, does not thereby give the right to his original co-partner to claim a share in the profits of the new firm. The violation of the agreement may give rise to an action for damages; but, in as much as the said original co-partner could not be held, without his consent, for the debts of the new firm, he cannot claim that he was made a partner therein, even unaware, on the ground that the original partnership was an universal one.

A partner is estopped, in the liquidation of the partnership, from denying to the prejudice of his co-partner any of the entries in the books of the firm, unless he charges and proves error.

J. Murrell et al. vs. Mary E. Murrell et al., 1223.

5. The wife, as individual creditor of her husband, cannot compete with

PARTNERSHIP—Continued.

the partnership creditors of an insolvent firm of which he is a partner, in the distribution of the partnership assets. The fact that the other co-partners had retired from the firm and that the husband alone asked for a respite and made a surrender, does not alter the principle.

The partnership creditors share equally with the individual creditors in the individual assets.

E. J. Gueringer vs. His Creditors, 1279.

6. A party knowingly taking the note of a firm from one of the partners for his own debt, cannot hold the firm or the other partners liable without proof of the special authority or ratification, and the burden of proof of the special authority or ratification is in such holder.

Mechanics' & Traders' Ins. Co. vs. Richardson & Cary, 1308.

7. A partner cannot use the name of the firm as security for the debt of a third person or of *himself* without special authority from all those composing the firm. A party receiving such security under those circumstances, although not chargeable with actual *mala fides*, does so at his risk and peril, and cannot hold the firm and its other members responsible, unless upon proof of knowledge, consent or ratification. Review of English and American authorities.

Mutual Nat. Bank vs. J. P. Richardson et al., 1312.

8. One partner cannot, without the assent of his co-partners, bind the firm for his individual debt or that of a third person.

Where a partner, acting *apparently* beyond the limits of his authority, untruly states his co-partners' consent, his representations will not bind them, even in favor of parties dealing with him in good faith.

It is the duty of every one who deals with a member of a commercial partnership *out of the line of business* of such partnership, to require evidence of that partner's special authority to bind his co-partners,—and this at the risk and peril of said party.

Allen, Nugent & Co. vs. G. W. Cary et al., 1455.

PETITORY ACTION.

1. A judgment creditor can legally sue for the recovery of his debtor's property in the hands of third persons, in order to make it liable for his debt, and, for the purposes of his suit, he can legally assert all the rights of his debtor in and to the property.

Such a suit is not the Revocatory action, but is the nature of the Petitory action. 30 An. 733.

The prescription applicable to such a suit is that which governs the Petitory action.

Such an action being petitory in its nature, the tender and putting in default are not conditions precedent to the recovery of the property and of the fruits and revenues.

PETITORY ACTION—Continued.

The debtor, in such a suit, being made co-defendant with the actual possessors, and in his answer joining the Plaintiff and claiming the property as his own, will be viewed in the light of an intervenor in a petitory action.

W. B. Spencer vs. Goodman & Bradfield, et als., 898.

PLEADINGS.

1. An Exception to the right of Defendant to reconvene, should be urged *in limine*.

A party cannot take the chances of a decision in his favor on a voluntary submission of the merits of the cause, and then escape the effect of an adverse judgment upon such a plea.

B. Saloy et al. vs. City of New Orleans, 79.

2. The averment of Plaintiff, that he is in possession of property bought by him when he was a minor, is a sufficient averment of his ratification of his purchase after he became of age to enable him to revendicate the property against the seizing creditor of his vendor.

A. Duric vs. J. B. Henry et al., 102.

3. Plaintiff discloses no cause of action in a suit for damages on account of a malicious prosecution, when he does not aver the termination of the prosecution.

Henry T. Lawler vs. Alexander Levy, 220.

4. Defendant in an action for slander of title, by setting up title in himself, changes the suit into a petitory action, in which he becomes plaintiff, and he must succeed or fail on the strength of his own title, and not on the weakness of his adversary's.

Edward J. Gay vs. Thos. H. Ellis, 249.

5. In an injunction suit to restrain the execution of a judgment, the plaintiff cannot plead and prove matters which were at issue and have been adjudicated upon in the original suit between the same parties, on the ground that new evidence has been subsequently discovered.

A. L. Gusman et al. vs. L. DePoret et al., 333.

6. There is no improper joinder of actions and of parties, in a suit for actual and punitive damages, against the principal and the surety on an injunction bond.

E. Conery et al. vs. Temple S. Coons et al., 372.

7. When the plaintiff in injunction seeks to restrain the execution of a judgment, on the ground that the property seized belongs to him, and not the judgment debtor; the only issue in the case is that of ownership.

Miguel Basso vs. Benker, Sheriff, et al., 432.

8. An Intervenor in a suit by provisional seizure for rent of a stable, averring that he is the owner of the horses seized and that he pays rent to the lessee of the stable to keep said horses there, discloses a cause of action in his Petition of intervention.

Josephine M. King vs. Wm. F. Harper, M. Heyman, Intervenor, 496.

PLEADINGS—Continued.

9. It is not by writ of Injunction, but by that of *Mandamus*, that a judgment creditor of the City of New Orleans should proceed to compel its Mayor and Administrators, in preparing the annual budget of the city, to comply with the law by placing his judgment thereon and providing for its payment.
Such being the case, Plaintiff's petition for an Injunction discloses no legal cause of action.
Lawrence F. Barrett vs. City of New Orleans, 542.
10. The Court *a qua* ruled properly, that the Petition of intervention of the judgment debtor in the garnishment process against third persons, should stand as an Answer.
C. Kline vs. Parish, etc., 562.
11. An executrix, who is also the widow in community of the testator, being sued in the former capacity only, but raising, in her defense of the suit, the issue of her rights as usufructuary, will be personally concluded by the judgment, and cannot afterwards attack its validity on the ground that she was not cited in her individual capacity.
Widow J. A. Denegre vs. Widow A. P. Denegre, 689.
12. A document annexed to and made part of the Petition, controls the allegations thereof, in case of variance.
Teutonia Nat. Bank vs. J. M. Wagner et al., 732.
13. A suit brought in the name of a corporation without designation of any officer, will stand when, on trial of the Exception taken on that point, it is shown that the action was instituted by the President with the approval of the Board of Directors.
Insurance Oil Co. vs. John H. Scott, 946.
14. Defendant's Answer absolutely denying that he ever was a debtor of Plaintiff in the matter sued upon, he cannot pretend that the circumstances of the case, as disclosed by the evidence, show a novation of the original debt, by which he is released.
Consolidated Fruit Jar Co. vs. M. L. Navra, 995.
15. Defendant, having in his original answer admitted the adjudication to him, at a tax sale, of plaintiff's property, cannot be permitted to file an amended answer, setting forth error, possession in himself and other facts, which alter the substance of the original answer.
J. E. King vs. E. Gantt et al., 1148.
16. In a suit to set aside a settlement of partnership, on the ground that the same was based on error, an appointment of auditors of accounts by the court is proper to determine whether there have been in the settlement such errors as alleged; and Defendant, in moving to homologate the report of the auditors, waives no right of maintaining the original settlement.
M. Keough et al. vs. C. W. Foreman, 1434.

PLEDGE.

1. It is well established that the pledgee of a note has the right to sue upon it in his own name.

Bank of Lafayette vs. Mrs. E. J. Bruff, 624.

2. The pledgee may have possession through a third person, chosen by him and the pledgor.

J. C. Weems, Rainey subrogated, vs. Delta Moss Co., 973.

3. Under Act No. 66 of the Legislature of 1874 (Sec. 3), cotton bought at Shreveport and unpaid for by the purchaser, but shipped by him for New Orleans, is in the possession of the consignee the moment the bill of lading is given to the common carrier for transmission, and said consignee has, from that time, a pledge upon the cotton, superior to the vendor's privileges.

Forsheim Bros. vs. Z. Howell, John Phelps & Co., Intervenors, 1184.

4. The shares of the capital stock of corporations are not "credits" within the meaning of the Code, and the pledge of such stock is perfect by the simple delivery of the Certificate of stock, without notice to the corporation.

The principle is binding upon the Corporation itself, whatever its by-laws may provide to the contrary.

The maxim of *stare decisis* should apply in this case.

A. Pitot, Sequestrator, vs. C. P. Johnson et al., 1286.

PRACTICE.

1. A defendant, who does not insist upon the trial of an exception before the case is tried on the merits, is presumed to have waived the exception.

T. J. Hickman, et al. vs. Mary J. Dawson and husband, et al., 438.

2. Plaintiff, alleging himself to have an interest in common with Defendants in a certain judgment against a third person, enjoined the judgment debtor from paying the amount of his interest to Defendants. The latter on Motion obtained the dissolution of the injunction.

HELD—For the purposes of the Motion to dissolve the injunction, the averments of the Plaintiff's petition must be taken for true. Therefore, as part owner of the judgment, Plaintiff had the right to enjoin the judgment debtor from paying his share of it to Defendants, and the injunction should not have been dissolved.

A. D. Rawlings, et al., vs. Mrs. M. J. Bowie, et al., 573.

PRESCRIPTION.

1. The acknowledgment of a debt by the administrator of a succession suspends prescription during the entire pendency of the administration. Reaffirming previous Decisions.

Seizure and notice, under execution of a twelve months bond, interrupts prescription, as in cases of executory process.

Emile Cloutier et al. vs. R. E. Lemee, Provisional Syndic, et al., 305.

PRESCRIPTION—Continued.

2. The claim of the Administratrix for having supported her mother during her lifetime and administered to all her wants, could only be prescribed by ten years.

Succession of Mrs. Hannah Newton, 621.

3. Citation against some of the solidary obligors, interrupts prescription against the others.

Vredenburg et al. vs. W. J. Behan et al., 627.

4. Failure to serve notice on defendant, of judgment rendered against him by default, is one of the informalities which are cured by the prescription of five years.

Widow A. Holt et al. vs. Liquidators of Hart & Hebert, 673.

5. When the administrator of a Succession applies for an order of sale of property to pay debts, and annexes to his Petition a list of the debts to be paid, it is a sufficient acknowledgment of such debts to interrupt prescription.

The acknowledgment of a debt by the administrator of a Succession, so as to interrupt prescription, may be made in other ways than the sacramental manner prescribed by Art. 985, C. P.

Michael Troendle vs. O. De Bouchel, 753.

6. A long line of authorities have established a distinction between the technical sufficiency of a citation, as a basis for the maintenance of proceedings and judgment, and its sufficiency for the purpose of interrupting prescription.

Citation for the purpose of interrupting prescription needs not be technically perfect either in form or service.

C. Satterley vs. Charles Morgan, 846.

7. The fact that the note, upon which the executory process issued, was prescribed on its face, and that the Administrator of the succession against which the suit was brought, did not plead the prescription, does not affect the validity of the sheriff's sale.

The prescription of five years, under article 3543, C. C., cures such informalities and irregularities in sheriff's sales as : a waiver of notice of order of seizure and sale by an Administrator of succession ; postponement of the sale ; and an adjudication for less than the inventory appraisalment.

J. M. Munholland vs. Mrs. Scott et al., 1043.

8. The plea of interruption of prescription, after the latter has been acquired, can only be supported by written evidence.

Julie Cormier, Adm., vs. T. DeValcourt, Adm., 1168.

9. A defective and insufficient description of the property sold, in the sheriff's advertisement, is cured by the prescription of five years as established by Art. 3543, C. C. Previous Decisions affirmed.

PRESCRIPTION—Continued.

The purchaser who knew the defect in the title of the property he purchased, and, owing to such defect, got the property for much less than its value, cannot be considered as a purchaser in good faith, in the legal sense of the word, and is not protected by the prescription of ten years.

The prescription of three years does not apply to the rents and revenues of property claimed in the petitory action, against a purchaser in bad faith.

Walling Heirs vs. A. S. Morefield, 1174.

10. An executrix who has, by error, acknowledged in writing on the back of a note that the same was still due, may be heard as a witness to prove that the written date of such acknowledgment is false, and that, in fact, she signed the acknowledgment at a time when the note was already prescribed.

Succession of Walter O. Winn, 1392.

11. Under the principle of *stare decisis*, this Court will not disturb the rule established by numerous Decisions, that prescription was not suspended during the late civil war in this country.

Ibid.

12. This Court does not consider the rule of suspension of prescription established in Section 1048 of the United States Revised Statutes, as intended by Congress to be acknowledged and enforced by State Courts. The isolated case of *Stewart vs. Cohn*, 11 Wall. 493, is not acknowledged as authority, and that of *Aby & Catchings vs. Brigham*, curator, is overruled.

Ibid.

13. The notes furnished by a stockholder of the Citizens' Bank for the amount borrowed by him, are not prescribed so long as his certificate of stock remains deposited and pledged to the Bank, under the provisions of its Charter.

E. Latiolais, Adm., vs. Citizens' Bank, 1444.

PORT OF NEW ORLEANS.

1. What, under the laws of Congress and of this State, constitutes the Port of New Orleans.

A Branch Pilot of the Port of New Orleans, who has his domicile in the Parish of Orleans, must be sued in said Parish under the "Intrusion Act," and not in the Parish of Plaquemines, on the ground that such a person has no land domicile and that his functions are exclusively exercised within the latter Parish.

The State ex rel. J. C. Egan, Attorney General, vs. Hiram Follett, 228.

PRIVILEGE.

1. An agent employed to solicit sales of the goods of a manufacturer, with a monthly salary and a commission on all sales affected by

PRIVILEGE—Continued.

him, is not a clerk within the meaning of the law, in respect to the privilege for the payment of salaries.

A judgment, recognizing the privilege of a creditor, does not conclude other creditors in a *concurso* and only makes a *prima facie* case against them.

J. C. Weems, Rainey, subrogated, vs. Delta Moss Co., 973.

PROHIBITION.

1. This Court will not issue the writ of Prohibition where the evil complained of may be remedied by Appeal.

The mere apprehension that two courts, trying cases between the same parties, may issue conflicting orders to the injury of the Relator, is not a sufficient cause for this Court to interfere, by anticipation of the conflict, in the proceedings of one of the two courts, and issue the writ of Prohibition against the judge thereof.

The writ of Prohibition is not one of right, and should only issue in case of usurpation of power of jurisdiction by the lower court. 32 An. 1186.

State ex rel. Jos. Hernandez vs. Judge, etc., 923.

PUBLIC OFFICERS.

1. Act No. 44 of 1877, providing that the Clerk of the District Court shall be *ex officio* member of the jury Commission, does not confer upon him an additional office, in violation of the Constitutional restriction.

State of Louisiana vs. John Somnier, 237.

2. The Governor has the power to fill vacancies occurring by death, resignation or removal, during the interim between the sessions of the Legislature, subject to confirmation by the Senate, when it meets. Affirming Decision in 32 An. 934.

The Inspectors of weights and measures for the several Districts of the City of New Orleans, are State, and not Parish, officers.

Therefore, sec. 3924 of the Revised Statutes, which provides for their removal by the Governor for a certain cause, is not repealed by Art. 201 of the Constitution, which provides for the removal of Parish or municipal officers, by judgment of Court.

In the exercise of the power, given to him by law, of removing public officers for certain causes, the Governor is the sole judge of the existence of such causes, and his action of removal is final and irreversible by the Judiciary.

The State ex rel. Attorney-General and William Martin vs. V. Lamantia, 446.

3. The State has the undeniable power to prescribe qualifications as conditions precedent to the right to hold office, and, in ordaining such qualifications, the State Constitution could enact provisions with a retrospective effect, without violating the Federal Constitution.

PUBLIC OFFICERS—Continued.

Article 171 of the Constitution, providing for the ineligibility of public officers for certain causes, was intended to have a retroactive operation as well as to provide for the future.

The reason, object and means of enforcing said Article 171, fully considered.

In an issue as to the eligibility of a public officer under the same Article, the *discharge obtained by him from the competent authority* cannot be attacked collaterally. It must be done directly, and the discharge must be averred to have been obtained by fraud or error.

The admission of Defendant, that he has made no settlement with the School Board of the Parish for School funds, though coupled with the allegation that he has disbursed more money than he received, on account of said Board, and that his vouchers have been filed with the State Auditor,—is a full solution of the question at bar. As he has not obtained his discharge from the proper authority, the School Board, he is not eligible under Article 171.

The State ex rel. Howell, District Attorney, &c., vs. Echeveria, sheriff, et al., 709.

4. Absence of a public officer from the place where he holds his office, caused by sickness and medical treatment, does not amount to the change of residence, for which, under Article 195 of the Constitution, the office is vacated.

W. H. McGregor vs. R. W. Allen, 870.

5. A public officer vacates the office held by him by accepting another office incompatible with the former. 32 An. 193.

State of Louisiana vs. J. Dellwood, 1229.

Same vs. M. West, 1261.

PUBLIC USE.

1. The rents of property dedicated to a Parish for public use, are, like the property itself, exempt from seizure for debt, even if the object of the dedication has been abandoned or changed by the municipal authorities of the Parish.

C. Kline vs. Parish, &c., 562.

RECONVENTION.

1. The reconventional demand being for less than \$1000, this Court has no jurisdiction to revise the judgment rendered thereon.

J. A. Stevenson vs. Whitney, Tax Collector, et al., 655.

RECORDER OF MORTGAGES.

1. The Recorder of Mortgages is responsible for the amount loaned on mortgage, on the faith of his Certificate that the property mortgaged was free of previous encumbrances, when in point of fact, the said property was mortgaged for more than its value, and the money loaned is thereby lost to the lender.

RECORDER OF MORTGAGES—Continued.

Such an action against the Recorder of Mortgages is on his official bond and, therefore, *ex contractu*, and not prescribed by one year.

David R. Fox vs. C. B. Thibault et al., 32.

2. The Recorder of Mortgages cannot be held responsible for the loss of the legal mortgage of the wife, by the inscription of the marriage contract in the book of Donations, previous to the legislation which requires that such mortgage be recorded in the book of Mortgages. At that time, the inscription of the contract in the book of Mortgages would have had no more effect than the same in the book of Donations, inasmuch as the legal mortgage of the wife existed without inscription. The Recorder could not be expected to have anticipated the change of legislation. It was for the wife herself to have complied with the requisites of the new law.

Marie E. Martin, Wife, &c., vs. Pierre Landreau et al., 676.

RECUSATION.

1. When a judge is recused on account of interest in the cause, he cannot himself decide the issue raised on that point by his denial, but must refer it, to be tried as provided by law.

The State ex rel. Tyrrell vs. Judge, etc., 1293.

REGISTER OF CONVEYANCES, PARISH OF ORLEANS.

1. The Register of Conveyances of the Parish of Orleans is by law bound to furnish to the Board of Assessors a monthly statement and certificate of all conveyances recorded in his office, without requiring stamps or making any charge therefor.

The State ex rel. John C. Bach vs. Recorder of Conveyances, 223.

REGISTRY.

1. Registry of an act of sale under private signature, is sufficient notice to third persons, of the mutation of title, without proof of the signatures of the parties to the act. Distinction between the effect of registry of an act of sale, as to notice, and the effect of the act itself as proof of title. Previous Decisions affirmed.

J. W. Stallcup vs. J. L. Pyron, 1249.

REHEARING.

1. The application of an *Amicus curiæ* for a Rehearing, though made within the six judicial days, does not retard the finality of the judgment of this Court.

Life Association of America vs. G. L. Hall, 49.

2. The very object of an application for a rehearing is to have this Court reconsider whether or not there is error in the Decision rendered on the record such as it is. When there is no such error, the rehearing must be refused. If the record is defective, it is not after judgment rendered in this Court, that it can be corrected. *Bacas vs. Smith*, 33 An. 142, affirmed.

J. P. Maritche vs. Board of Liquidation, 588.

REMOVAL TO U. S. CIRCUIT COURT.

1. An appeal lies to this Court from an order of a State Court removing a cause to the Circuit Court of the United States.

A suit involving a Federal question, within the provisions of Sec. 2 of the Act of Congress of March 3d, 1875, is removable by the State Court to the Circuit Court of the United States.

Mrs. Eliza C. Johnson vs. New Orleans National Banking Association et al., 479.

2. In this controversy, the Plaintiff and some of the defendants were citizens of Louisiana, and the other defendants citizens of Vermont. One of the latter applied for the removal of the *whole suit* to the Circuit Court of the United States, under the laws of Congress, on the ground of prejudice and local influence against her. *Held* that, under none of the Removal Acts of Congress, could her application be granted. Those laws examined *seriatim* in the Decision.

Geo. A. Stafford, Executor, vs. H. M. Twitchell et al., 520.

3. A mere auxiliary proceeding, by which a third person comes in by way of injunction, to protect his property from being seized and sold under a judgment to which he was not a party, is not removable, under the Act of Congress of March 3d, 1875, from the State to the Federal Court. Affirming *Watson vs. Bondurant*, 30 An 1.

M. Ada Calhoun and Husband vs. L. L. Levy et als., 1296.

RES JUDICATA.

1. The judgment of the Circuit Court of the United States in Louisiana, dismissing the plaintiff's suit without any reserve for the renewal of the action, is not a judgment of nonsuit: it concludes the parties and constitutes *res judicata* when final.

Mary C. Bledsoe et al. vs. M. P. Erwin et al., 615.

2. When the question of jurisdiction has been decided by the lower Court on an exception, and this Court, in adjudicating upon the merits of the case, says that it does not notice the Exceptions because it was virtually waived by the Answer, the ruling of the lower Court constitutes *res judicata* between the parties on the same question of jurisdiction.

Widow J. D. Denegre vs. Widow A. P. Denegre, 689.

3. A judgment cannot be disturbed on appeal between the Appellees and, therefore, as to them, remains *res judicata* independently of the action of this Court.

V. H. Dickson and Husband vs. H. P. Dickson et als., 1370.

RESPITE.

1. On the trial of Oppositions to the application of a debtor for a respite, the creditors cannot propound interrogatories to him, such as, whether he had disposed of his property during the pendency of the respite proceedings, when the Oppositions contained no such charges, but only averred that he had not placed all his property on his schedule.

RESPITE—Continued.

It seems that it is no good ground of opposition to the application for a respite, that the debtor placed on his schedule parties who were not his creditors, because, by so doing, he cannot prejudice the real creditors, and any of the latter, though not on the schedule, can by making oath, vote at the meeting.

In the absence of charges and proof of dereliction of duty, the notary appointed by the Court to hold the meeting of the creditors, had the power, in the exercise of his sound discretion, to adjourn the meeting.

The majority in number and in amount, required for a forced respite, is that of creditors, whether placed on the bilan or not, who have appeared at the meeting, taken the oath prescribed by law, proved their claims and voted for the respite.

The respite and insolvency laws are perfectly distinct. The former rest upon the apparent solvency of the debtor, and are not suspended or affected by the general bankrupt law of the United States.

T. C. Anderson vs. His Creditors, 1155.

REVIVAL OF JUDGMENT.

1. *The Fifth District Court of the Parish of Orleans, created under the Constitution of 1868, had jurisdiction to revive a judgment rendered in the year 1867 by the Fifth District Court for the Parish of Orleans, created under the Constitution of 1864.*

A suit is still pending in a court as long as the judgment is not satisfied or prescribed.

The proceeding to revive a judgment is not a new suit, but part of the original action.

Whether the writ of fieri facias issues under the original judgment or that of revival, is immaterial ; in either case it is legal.

C. Scherrer vs. Caneza, sheriff, et al., 314.

2. *In an action to revive a judgment, the defendant cannot set up in opposition to the revival, irregularities or relative nullities with which the original judgment was affected. In such an action, the sole questions that can arise or be determined, are, whether the judgment sought to be revived, was ever rendered, and whether it still exists or has been extinguished in any of the ways provided by law. It is only to the revival of judgments which are absolutely void, as for want of citation or other like radical defects, that opposition can be made on the ground of nullity of the judgment.*

Folger & Son vs. W. S. Slaughter, et al., 341.

3. *In a suit to revive a judgment against a bankrupt, his assignee is the proper person upon whom to serve the citation, if he is still in office, but not if he has been legally discharged by the Bankrupt*

REVIVAL OF JUDGMENT—Continued.

Court, and is, consequently, *functus officio*. In the latter case, the citation served upon the ex-assignee has no legal effect whatever.

Grayson, Executor, vs. E. E. Norton, Assignee, 1018.

4. Under the laws creating the Parish of Grant, a judgment previously rendered by the District Court of the Parish of Rapides, cannot be revived by the same Court. It is the Court of the Parish of Grant, to which the suit, in which the judgment was originally rendered, is transferred, that has jurisdiction of the revival.

Article 3547, C. C., under which judgments are revived, did not provide an exclusive mode of preventing the prescription of such judgments. Affirming 30 An. 1071.

It is urged on the Rehearing that the citation in the revival suit, though brought before an incompetent court, interrupted the prescription of the judgment. The Court does not pass upon this point and leaves the parties at liberty to raise the issue in some other proceeding, but strikes from its original decree that portion which sustained the plea of prescription.

M. Ada Calhoun and husband vs. L. L. Levy, et als., 1296.

REVOCATORY ACTION.

1. This is a case of fraudulent *dation en paiement* set aside by the Revocatory action, in which the plaintiff obtains judgment, decreeing that he should be paid out of the property thus unlawfully transferred, by preference over the other creditors of the fraudulent debtor, in consequence (it seems) of his having had the transfer annulled by his suit.

Alfred Marchand vs. W. Van Norden et al., 803.

2. When immovable property has been sold by authentic act, valid on its face, and accompanied by actual delivery and continuous possession and control by the vendee as owner, a creditor of the vendor cannot seize the property in disregard of the transfer; and, when enjoined by the vendee, such seizing creditor will not be allowed to allege and prove that the sale is a fraudulent simulation. Review of the whole jurisprudence of Louisiana on this subject.

The title of the vendee, under such circumstances, can only be attacked in a direct action in avoidance of the sale, whether revocatory or *en déclaration de simulation*.

And, in such direct action, whether revocatory or *en déclaration de simulation*, the plaintiff must aver and prove that the act sought to be avoided operates injuriously to him.

J. W. Willis, Jr. vs. Scott, Sheriff, et al., 1026.

SALE.

1. The purchasing broker in this case was the agent of Plaintiff and not that of both parties.

In the sale of goods by merchants, who were not the manufacturers thereof, where there has been no deceit practiced, and where the means of knowledge were at hand and equally available to both parties, and the subject of purchase was alike open to their inspection, if the purchaser did not avail himself of these means and opportunities, he will not be heard to say, in impeachment of the contract of sale, that he was deceived by the vendor's misrepresentations.

J. Rocchi vs. Schwabacher & Hirsch, 1364.

SCHOOL LAND.

1. In default of satisfactory proof that the lot of ground claimed in this case as school land, was ever selected as such under the Act of Congress, this Court holds that there should be judgment of nonsuit against the Plaintiff, without passing upon the issues of title and prescription raised by the pleadings.

School Board vs. Rosa B. Rollins, et al., 424.

SEIZURE.

1. An action for the recovery of real estate and damages, is liable to seizure.

Notice of seizure of such an action to the Clerk of the Court, in which the suit is pending, to the defendant in the suit and to the plaintiff therein, is proper and sufficient, and constitutes a valid seizure.

The appraisement in a case of such seizure, should be as in other cases of seizure of incorporeal rights.

The advertisement of the Sheriff for the sale of such a claim, should be during thirty days, as for the sale of immovables.

The purchaser of the claim in such a case, being the defendant himself against whom the action is brought, has the right to plead confusion, in a rule against the plaintiff in the action, taken for the purpose of having the suit dismissed.

Miss Kate Nugent vs. John McCaffrey, 271.

2. A defendant in execution cannot enjoin the sale of his property by the sheriff, on the ground that no valid seizure has been made of the same.

The defendant in execution who complains that the sheriff has seized more property than necessary, must proceed under Article 652, C. P., and not by injunction, to have the seizure reduced.

It is no valid ground of injunction for the defendant in execution, that the sheriff has seized property which does not belong to him.

An attachment having been maintained, cannot be a legal cause of action for damages.

SEIZURE—Continued.

The seizing creditor, who has given no instructions to the sheriff for the keeping or administering of the property seized, cannot be held responsible for the illegal manner in which that officer discharged his duty.

A. L. Gusman et al. vs. L. De Poret et al., 333.

3. The seizure of immovable property vests in the sheriff the right to receive the fruits or rents from the date of seizure, for the benefit of the seizing creditor.

W. F. Anderson vs. C. Comeau, 1119.

4. The sheriff who, in execution of a writ of attachment, leaves a sum of money in the hands of a third person, and takes the latter's receipt for the same, constitutes said third person his keeper of the money seized, and is himself, to all intents and purposes, in the legal possession thereof.

Upon dissolution of the attachment, the sheriff must account to the defendant for said sum of money as if he had actually received and held it under the writ.

L. B. Watkins vs. Cawthon, 1194.

SERVITUDES.

1. Article 660, C. C., relating to the predial servitude of drain, is to be liberally construed in favor of the estate to which it is due. Previous decision affirmed. *Held* accordingly, that the owner of an estate whose waters flow by natural drain on the lands of his neighbor, has the right of cutting ditches or canals by which the waters may be concentrated and their flow increased beyond the slow natural process, by which they would ultimately reach the same destination.

Apparent predial servitude acquired by the prescription of ten years.

A. Guesnard vs. Executors of Bird, 796.

SUCCESSIONS.

1. A succession may be legally and validly renounced by a judicial declaration made to that effect by the universal legatee, in the Petition presented by him to the Court of Probates to be confirmed testamentary executor under the will. Article 1017 of the Civil Code is not exclusive of other modes of renunciation.

Carter, Congreve et al. vs. John P. Fowler et al., 100.

2. Labiche died in 1872, leaving certain heirs at law, who claimed his estate against one another. They subsequently made a compromise between themselves, by which some of them sold their rights to the others, who, thereupon, entered into possession of the estate and sold its property at public auction. Dupuy bought the property. He afterwards died, and the same property was sold by order of the Probate Court, and bought by Lacroix. This purchaser refuses to accept the title, because, in 1877, five years after the death of La-

SUCCESSIONS—Continued.

biche, his last will was discovered, by which he instituted his same legal heirs, his universal legatees, and made a number of money legacies.

Decided that the title is good and the purchaser in no danger of eviction, because the Compromise between the heirs of Labiche was made by all parties in view of the existence of a will and is binding on all of them, and because the special legatees have not recorded their legal mortgage against the property of the testator.

Succession of Francois E. Dupuis, 277.

3. The right of creditors of a succession to have the property thereof sold by the Executor to pay their claims, is absolute and in no manner dependent upon, or to be preceded by, an Account of Administration or Tableau of distribution.

Succession of M. L. Tabor, wife of James R. Devall, 343.

4. An executor sold some property of the estate by order of court, and with the proceeds paid the first mortgage creditor, before filing an Account and Tableau of distribution and without authority from the court. The second mortgage creditor called for an Account, and as, by the time it was filed, the inscription of the first mortgage had perempted and the debt it secured was prescribed, he opposed the Account, on the ground that the payment made by the executor without authority was not valid, and that, at the time the Account was filed, the only time when payment could be made, his second mortgage had become the first by peremption of the latter and prescription of the debt.

Held that, inasmuch as by the fact of the judicial sale, the first mortgage had been transferred to the proceeds, no re-inscription was necessary; and that, though payment by executors without authority should be deprecated, as, in this instance, the first mortgage creditor was the party entitled to the proceeds of the sale, at the moment they were paid to him, the executor should be credited with the amount paid and could not be condemned to pay it twice; and that an executor is entitled to credit for an irregular payment, if made to the proper party, whether the opposition is made by the heirs or creditors.

Succession of S. O. Rhea, 369.

5. It is discretionary with the judge of the Probate Court, on the application of the administrator of a succession, to cause the property ordered to be sold to pay debts, to be re-examined and re-appraised by the experts.

This re-appraisement can be made at any time before the sale.

It is only when the creditors demand it, that the property of a succession must be sold for cash. In the absence of such demand from the

SUCCESSIONS—Continued.

creditors, it is legal and proper for the Court to order the sale to be made partly for cash and partly on credit.

When property of a succession is sold to pay debts, on the application of the administrator, whether there are minor heirs or not, the adjudication can legally be made at the two-thirds of the appraisement.

It is only when the creditors demand the sale under Article 990 C. P., that the full appraisement must be reached.

Successions of J. B. Hood and Wife, 466.

6. A testamentary executor, who is also a universal legatee, although he has been recognized by the Probate Court in the two capacities and ordered to be put in possession, can be compelled to give security under Article 1670, C. C., if he has continued to act as executor.

After the order to give bond has been rendered by the Court, the executor cannot, to prevent its execution, raise any issue as to the merit of the creditor's claim.

The giving of bond does not admit the creditor's claim, which may be afterwards contested in other proceedings.

Succession of John Frazier, 593.

7. The statutory prohibition against purchases by administrators of successions, of the property thereof, is in favor of the creditors and heirs; and, therefore, the nullity of such purchases is not so absolute that they cannot be ratified or acquiesced in by the interested parties.

S. C. Prothro et al. vs. J. E. Prothro et al., 598.

8. A creditor of the heir of an estate, to whom the latter has granted a special mortgage upon the property thereof, cannot proceed *via executiva* and have that property seized and sold, while the succession, of which it forms a part, is still under administration, so as to strip the Administrator of the possession necessary for a liquidation of the affairs of the estate.

M. Dreyfus, Executor, vs. Richardson & May, 602.

9. A suit brought against a succession by the widow of one of the heirs, claiming the usufruct of her deceased husband's share of the estate, is not a real action or one of revendication, and can be brought against the executor alone, without making the heirs parties to it.

The court in which a succession is opened, has sole jurisdiction *ratione materiæ* to construe the will of the testator and to ascertain and pass upon the claims of parties asserting rights under or by virtue of it.

Widow J. A. Denegre vs. Widow A. P. Denegre, 639.

SUCCESSIONS—Continued.

10. The liability of the agent of an executrix for the illegal management of the affairs of the estate, is to his principal and not to the heirs. The claim of the latter for any loss which such agent may have caused the estate, is against the executrix.

The Executors in this case cannot be charged with the loss of funds in the hands of certain bankers in France, because they were authorized by the will of the testator to leave those funds there.

The Executors have no right to account on the *gold basis* for the pounds sterling, francs and other assets of the estate, converted into the United States currency. What the pounds sterling, francs, etc., realized in currency, should be accounted for in currency.

In default of a charge of malfeasance, the Executors cannot be held responsible for the difference between what the funds in Europe did realize and what they would have realized in 1865, had they then been converted by the Executors, because the matter was left to the discretion of the latter by the testator.

Heirs living in the family residence and rendering valuable services to the estate, cannot be charged with board and lodging, in the absence of substantial evidence of an agreement to that effect.

Mrs. A. P. Denegre vs. Widow J. D. Denegre, 694.

11. The nullity of purchasers by administrators of successions, of the property thereof, though absolute in one sense, may be ratified by the parties in interest.

The receipt of the price of sale by the heirs would be a sufficient ratification, if made with knowledge of the facts from which the nullity resulted.

The Defendant, urging that Plaintiffs cannot assail the legality of the sale because they have ratified it, should have specially pleaded the estoppel and cannot set it up under the general issue. Such defense is analogous to that of payment, release, novation, etc., and must be specially pleaded.

In a suit by the heirs for the recovery of property thus bought by the administrator, the tender of the price of sale is not necessary as a condition precedent. All that equity requires in such case, is to permit the defendant administrator to claim the amount in reconvention.

The plea of the necessity of tender of the price of sale should be set up *in limine* or, at least, specially.

The defendant administrator in such case is, in the sense of the law, a possessor in bad faith and, as such, bound to the restitution of fruits and revenues.

On the other hand, he is entitled to reimbursement of necessary ex-

SUCCESSIONS—Continued.

penses for the preservation of the property, under Article 2314, C. C., and to proper compensation for constructions and improvements, under Article 508, C. C. There is no reason to say that this article does not apply to possessors in bad faith.

Heirs of Wood vs. Joseph Nicholls, 744.

12. When the heirs of a deceased person have made proof of his death and of their heirship, though *ex parte*, and have been recognized as heirs and sent into possession, the succession of the decedent has been opened and closed. And thereafter, any *mortuaria* proceedings and decrees for the appointment of an administrator or curator, are null and void and of no legal effect. Until the original *mortuaria* are rescinded and set aside, or re-opened, by proper action of the court in which they were instituted, they stand as a perpetual bar to the demand of creditors for a judicial administration of the estate of the deceased. The recourse of such creditors is a personal action against the heirs who have thus been put in possession.

R. T. Beauregard, Curator, etc. vs. Julia A. Lampton, 827.

13. In estimating the active mass of a succession, the valuation in the inventory is not conclusive, and the true value of the property may be shown by other proofs.

In fixing the amount of the legitime of the forced heir, the funeral expenses and law charges must be considered as debts and be deducted from the active mass of the succession.

Succession of Lizzie Dean (Mrs. E. V. Mahood), 867.

14. A judgment on an Opposition to the Account of the Administrator may validly decree his destitution and that he should pay a certain sum of money for which he is liable to the estate, when a direct suit was first brought by the Opponent, praying for his dismissal for mal-administration, and the direct suit and the Opposition were cumulated and tried together.

Diana C. Gray, et al., vs. Waddell, Administrator, 1021.

15. The Administrator of a Succession, who has placed a privilege creditor, as such, on his account and tableau of distribution, cannot afterwards pretend to amend his tableau and recognize such creditor only as an ordinary one, on the ground that the acknowledgment of the privilege was made in error of fact, without proving, not only the error, but, also, that he was ignorant of it, at the time he presented the original account.

The fact that a privilege creditor has received part payment of his claim by anticipation and from the general funds of the estate, will not prevent him from being paid the full balance of his claim out of the particular fund upon which he has a special privilege.

Succession of T. S. Mulhern, 1047.

SUCCESSIONS—Continued.

16. A natural child, pretending to have been legally acknowledged by her deceased parent, can oppose the application of collateral heirs for the administration of the succession of said deceased parent, without having first been judicially decreed to be an acknowledged natural child, as claimed. The proof of patronage and acknowledgment may be made on trial of the Opposition to the application for administration.

The restriction contained in Article 221 of the Code of 1825, viz: "No other proof of acknowledgment shall be permitted in favor of children of color," having been repealed by elimination from the Code of 1870, children of color have now, whatever be their descent, the right to prove their acknowledgment in the same manner as white children.

A child whose parents, at the time of conception, could not contract marriage because one of them was a colored person, could legally be acknowledged after the prohibitory law was abolished.

The mother, in this case, was deaf and dumb, and was, several years after the acknowledgment, interdicted for insanity. These reasons were also urged to show the illegality of the acknowledgment, but were overruled by the Court.

Succession of Melasie Hebert, 1099.

17. No administrator should be appointed to a succession which is not burdened with debts and requires no liquidation.

Ibid.

18. Act No. 106 of the Legislature of 1880, giving power to the Clerks of the District Courts, throughout the State, the Parish of Orleans excepted, to appoint administrators of successions, does not dispense them with the necessity of rendering an order in making the appointment; and, until such an order is rendered, the appointment is invalid and a party with a better right to such appointment, is in time to present his application.

Succession of A. Picard, 1135.

19. A testamentary executor who has qualified as such, cannot be deprived of his commission on the amount of the inventory because the heirs and legatees agreed between themselves to make a distribution of the assets of the succession.

Succession of Mrs. J. Hopkins, 1166.

20. There is no inconsistency in the heirs bringing suit for the nullity of the sale of the property of the estate by the administrator, and, at the same time, demanding that the administrator be ordered to file his account and be removed from office, and that they be put in possession.

Heirs of Thompson vs. Barrow, Administrator, et als., 1225.

21. A. had been living a number of years in New Orleans, where he own-

SUCCESSIONS—Continued.

ed real estate. He was unmarried, old and infirm. He left there, taking with him his furniture, and went to the Parish of St. Mary, to the house of his nephew, where he died a short time after he arrived. His succession was opened both in New Orleans and in the Parish of St. Mary. The question is : where did he reside when he died ? *Held* that the circumstances of the case show his residence was in the Parish of St. Mary where he went with the intention of remaining ; and that his Succession was legally opened there.

A. Verret vs. R. Bonvillain, 1304

22. Differently from an Administrator, a testamentary Executor, can appeal officially as Executor, from a judgment rendered against him and in favor of the succession.

Succession of Josephine Hale, wife of Ames, 1317.

23. An Executor is not entitled to favor in the assertion of merely technical pleas tending to exclude from judicial determination questions affecting the lawful distribution of the estate administered by him.

Ibid.

24. Demand of delivery or payment of a special legacy to entitled the legacy to interest, is expressly dispensed with when the legatee is himself the Executor. C. C. 1628-30.

Ibid

SUPREME COURT OF LOUISIANA.

1. Under the present Constitution, this Court has no jurisdiction when the matter in dispute exceeds \$1000 only by adding interest to the principal.

State of Louisiana ex rel., Forman vs. Recorder of Mortgages et al., 14.

2. The practice tolerated by this Court, in view of expediting business and lessening costs, of considering as part of the Transcript of Appeal, records of other cases filed in this Court, must be exercised with discretion and within reasonable limits. When, therefore, other Transcripts are intended, by agreement of Counsel, to be used in this way, as part of the Record of the case at bar, reference must be made to the title and number of said other Transcripts, and the attention of this Court must be called to them, or it will not treat them as part of the evidence before it ; and the defect shall not be remedied on application for a rehearing.

Succession of Patrick Irwin, 63.

3. The Constitution, laws and treaties of the United States are as much part of the laws of every State as its own local laws and Constitution, and the duty of this Court is to administer all the laws of the land, those of the United States as well as those of the State of Louisiana.

B. Saloy et al. vs. City of New Orleans, 79.

SUPREME COURT OF LOUISIANA—Continued.

4. This Court has no appellate jurisdiction over a suit between the contestants for a public office to which no salary or pecuniary perquisite is attached. Decision in *State ex rel. Newman et al. vs. Hayles*, 32 An., 1135, affirmed.

The State ex rel. Buckner et al. vs. Jastremski et al., 110.

5. This Court has already several times decided that, under Art. 90 of the Constitution of 1879, it has authority to issue remedial writs to all inferior Courts, even in cases in which no Appeal lies to this Court. In the future, defences of this character will be ignored.

State of Louisiana ex rel. Fredericks vs. Judge, &c., 146.

6. This Court, under the supervisory power granted to it by Article 90 of the present Constitution, and in the exercise of the original jurisdiction thereby vested upon it, can compel by *Mandamus* an inferior Court to try a case over which the latter has decided it has no jurisdiction, and which is not appealable to this Court.

The State ex rel. McGee, Snowden & Violet vs. Judges, etc., 180.

7. This Court will not use its supervisory power, under Article 90 of the Constitution, by the writ of *Certiorari*, to investigate whether or not, an inferior Court, in an unappealable case has decided correctly, when it has acted within the limits of its jurisdiction and in proceedings apparently legal.

The State ex rel. O. Valetan vs. Judge, etc., 255.

8. This Court will not use its supervisory power, under Article 90 of the Constitution, to compel a District Judge, who has appointed, according to his judgment and his conscience, one of two applicants tutor to a minor, to appoint the other applicant instead, on the ground that the latter is the party designated by the law. The Decree can only be reversed on Appeal, if illegal.

Nor is it an open question any more, that a *Mandamus* does not lie to control the exercise of the discretion of inferior courts, in a particular manner.

The State ex rel. Elizabeth Horsh vs. Judge, &c., 268.

9. In actions to enjoin the execution of judgments, as between the parties themselves, the jurisdiction of this Court depends on the amount of the judgment enjoined, and is not aided by the value of the property seized, or by the amount of the damages claimed by the appellant.

Mrs. Zulme E. Hearsey and Husband vs. Booth, Sheriff, et al., 300.

10. The Courts of Appeals are, under Article 90 of the Constitution, amenable to the supervisory authority and power of the Supreme Court, like all the other tribunals of the State, and, in that respect and for that purpose, they are *inferior* Courts.

The State ex rel. Widow Harper vs. Judges, &c., 358.

SUPREME COURT OF LOUISIANA—Continued.

11. Writ of *Certiorari* refused by this Court on the ground that, under the supervisory power, granted by Article 90 of the Constitution, it cannot pass upon the correctness of the judgment of an inferior Court, in an unappealable case, when said judgment appears on its face to have been legally rendered.

The State ex rel. J. Markey vs. Judge, &c., 378.

12. A final decree of this Court must be executed by the Court *a qua*, in the manner ordered in the judgment, and the inferior tribunal has no authority to inquire into the legality of the mode of execution so decreed.

Heirs of Stafford vs. Henry Renshaw, 443.

13. This Court has no authority to issue the writ of Prohibition, either in the exercise of its appellate or supervisory powers, unless it is to an inferior judge exceeding the bounds of his jurisdiction.

The State ex rel. Dowling vs. Mic, Sheriff, et al., 794.

14. This Court cannot review a criminal case on appeal, when the Transcript contains no bill of exceptions, no motion in arrest of judgment and no assignment of errors, and there is no defect in the proceedings patent on the face of the record.

State of Louisiana vs. J. W. Potter et al., 195.

15. An issue about the legal *status* of one of the parties, which requires the introduction of evidence to prove the facts alleged, cannot be raised in this Court.

Southern Mutual Insurance Co. vs. Mrs. Mary A. Pike et al, 823.

16. This Court, by virtue of the authority to it granted by Article 90 of the Constitution, orders the judge of the Second City Court to hear the evidence and pass upon the Exception to his jurisdiction, before proceeding further in the case.

The State ex rel. Hallisy vs. Judge, etc., 832.

17. In a suit to compel the Treasurer of the State by Mandamus to stamp six bonds of the State of Louisiana, for \$1000 each, reducing the interest thereon, under the provisions of the ordinance of the Constitutual Convention of 1879, this Court has jurisdiction, because the amount in dispute is the interest on \$6000, at the rate of two per cent. per annum for five years, three per cent. for fifteen years, and four per cent. thereafter until the year 1914, making an aggregate sum of \$6660.

The State ex rel. Ecuyer vs. E. A. Burke, Treasurer, 969.

18. In a suit enjoining a seizure, a claim for damages cannot vest, or contribute to vest, this Court with jurisdiction. 30 An. 427, affirmed.

J. Lemle vs. Ronton, Sheriff, et als., 1005.

19. The verdict of the jury, even as to the facts of the case, has no controlling influence upon the conclusions of this Court. It is its pro-

SUPREME COURT OF LOUISIANA—Continued.

vince and duty to reverse such verdict, as well as the judgment of an inferior court, when a careful examination of the record and review of the evidence show that the jury was mistaken as to the facts. To hold otherwise would be defeating the object of the law by which this Court is to review the facts as well as the law of the case.

Manlius Boon vs. B. F. O'Neal, 1187.

20. This case not coming within the appellate jurisdiction of the Supreme Court, and the Court of Appeals having neither usurped jurisdiction nor refused to perform any duty imposed upon it by law, this Court will not use in the premises its supervisory power under Article 90 of the Constitution. Previous decisions affirmed.

State ex rel. Gilmer vs. Judges, etc., 1201.

21. This Court will not issue the writs of Certiorari and Prohibition, in exercise of its supervisory power over inferior courts, except in cases of usurpation of jurisdiction or power. Previous decisions affirmed.

The State ex rel. M. Selles vs. Judge, etc., 1284.

22. This Court will not issue the writs of Prohibition and Certiorari to inferior judges in cases in which they have exercised their legal authority and discretion. Previous decisions affirmed.

The State ex rel. Dardenne, President, etc., vs. Judge, etc., 1356.

23. A judgment of this Court, declaring a State officer ineligible and his office vacant, commanding nothing to be done and upon which no writ issues, needs not be recorded in the court below to produce its legal effect. Such judgment becomes, upon its rendition, instantly operative.

In the case at bar, the judgment of this Court was rendered on a rehearing and no delay was necessary for its finality.

The State ex rel. Pugh, Coroner, etc., vs. Judge, etc., 1381.

24. It does not appertain to the inferior courts or judges of the State to determine or recognize the operation and effect of a writ of Error directed to this Court by the Supreme Court of the United States.

Ibid.

25. This case is a proper one, for the exercise, by the writs of Mandamus and Prohibition, of the plenary powers granted to this Court by Article 90 of the Constitution.

Ibid.

SUPREME COURT OF THE UNITED STATES.

1. There exists a wholesome comity between the highest Federal tribunal and the highest Courts of the several States, under which the former accepts as binding upon it the construction placed by the latter upon their own Constitutions and statutes; and it is justly due that the latter should pay equal regard to the adjudications of the former.

SUPREME COURT OF THE UNITED STATES—Continued.

In all questions involving the meaning and effect of the Federal Constitution, the Supreme Court of the United States is the final arbiter, whose Decisions this Court must accept as the highest authority.

B. Saloy et al. vs. City of New Orleans, 79.

SURETYSHIP.

1. When the sureties have not pointed out property of the principal debtor and advanced the sum necessary for the discussion, and said principal debtor is notoriously insolvent, they cannot enjoin the execution of the judgment against them, on the plea of discussion.

The sureties of the sheriff cannot plead compensation against debts of the latter, for which they are responsible and which, by law, are not compensable, such as claims against him for moneys received and not officially accounted for.

W. B. Schmidt, et al. vs. City of New Orleans, 17.

2. The surety on an official bond cannot pretend that he is not liable because the law requires that such sureties should be residents of the State and he is not.

Sureties on a bond, binding themselves and each of them, are liable *in solido*.

The failure of the Board of School Directors to require regular accounts and settlements from their treasurer, does not discharge the sureties of the latter.

The Board of School Directors have the right to sue on the official bond furnished by their treasurer, though it is made payable to the Governor of the State.

Board of School Directors vs. A. V. Brown et al., 383.

3. The discontinuance of the suit against some of the solidary obligors does not discharge the other Defendants.

V. Vredenburg et al. vs. W. J. Behan et al., 627.

4. The surety is only discharged by a prolongation of the term of payment granted the debtor, when it is granted by a party having the legal authority to do so. The administratrix of a succession has no such authority; and the fact that she was also widow in community does not give her any additional power in that respect.

Mrs. M. J. Jackson, Admrx. vs. Wm. C. Michie et al., 723.

5. The sureties of the cashier of a bank who, in the very bond signed by them, recognized the legal existence of that corporation, are estopped from denying that the bank had such legal existence at the date of the bond.

The sureties on such bond, though bound *in solido* with the principal, are several obligors *inter sese*, if the solidarity between themselves is not expressed. They are bound by distinct and separate contracts,

SURETYSHIP—Continued.

though such contracts are evidenced by only one act, the bond. Therefore, the discharge of one of the sureties by the common creditor does not release the other sureties.

The sureties of a bank officer are liable, not only for the acts done by him by virtue of his office, but also for those done under color or by means of his office.

Teutonia Nat. Bank vs. J. M. Wagner et al., 732.

6. The surety on a release bond cannot be held for a greater or different amount than his principal.

The obligation of the principal on such bond is to produce the property on the day of sale, and, in default thereof, to pay the amount of the judgment with interest and costs, but not the amount of the bond, nor the value of the property if it exceeds the amount of the judgment. 33 An. 416, affirmed.

J. Lemle vs. Routon, sheriff, et al., 1005.

TAXATION.

1. Condemnation of the theory, that taxes levied under the *Mandamus* of a Court constitute judicial taxation.

B. Saloy et al. vs. City of New Orleans, 79.

2. Exemptions from taxation must be strictly construed.

Baton Rouge R. R. Co. vs. Kirkland, Sheriff, et al., 622.

3. Municipal corporations have no inherent powers of taxation, but can tax only as the State has thought proper to permit.

The State ex rel. Emily E. Griffin vs. City of Shreveport, 1179.

TAXES.

1. The validity of the assessment of taxes for the year 1880 and the levy of the same in December, 1879, by the City of New Orleans, by virtue of the laws then in force, was not affected by the Constitution of 1879, or subsequent statutes. Decision in *New Orleans vs. Vergnole*, 33 An. 35, affirmed.

The summary mode of collection provided for by said Constitution and Act No. 77 of 1880, does not apply to the taxes levied by the City of New Orleans in December, 1879.

When property of a succession, upon which the said City has a privilege for the payment of her taxes, has been sold by order of the Court of Probates, that privilege is transferred to the proceeds and the City has the right to be paid out of the same, and, therefore, to oppose the account of the Executor.

The condition affixed to the sale by the order of Court, that the purchaser shall assume certain taxes, cannot bind the City who is no party to the proceedings or agreement, and compel her to sue the purchasers for the payment of such taxes.

Succession of Francois E. Dupuy, 258.

TAXES—Continued.

2. Whether taxes due on the property were recorded or not, Defendant cannot recover the amount paid for them by the sheriff out of the price of sale.

A. Reichard vs. F. Michinard et al., 380.

3. The assessment and judgment for taxes against a Succession, as such, are legal, when the heirs have not obtained and recorded a decree of court recognizing and putting them in possession. Affirming Decision in *City vs. Stewart*, 28 An. 180.

Carter, Congreve et al. vs. City of New Orleans et al., 816.

4. The special tax of twenty mills (in excess of the ten mills constitutional limit) levied on the 25th of September, 1880, by the Police Jury of the Parish of Concordia, for the purpose of building a levee on Lake Concordia, is unconstitutional and illegal.

The proviso of Act No. 96 of 1877, prescribing that "on the written application of majority in value of the tax payers of a Parish, the police jury shall be authorized to levy additional taxes, not in excess of five mills," is manifestly inconsistent with Article 290 of the Constitution and, therefore, repealed.

It is clearly the intention of the Constitution, that the proviso of Article 209, by which municipal taxes for works of public improvements, etc., may be levied beyond the ten mills limitation, should not be self-operative, and that the municipal authorities should not have the power to impose such additional and indefinite taxes, without legislative warrant.

James Surget vs Chase, Tax Collector, 833.

5. Coal brought from Pennsylvania to New Orleans for sale, can legally be taxed by the State of Louisiana, and the tax thus levied upon it is not obnoxious to any of the three constitutional principles invoked in this case, viz: 1st, that the citizens of each State shall be entitled to all the immunities and privileges of citizens of the several States; 2d, that Congress shall have power to regulate commerce, with foreign powers and among the several States; 3d, and that no State shall levy any imposts or duties on imports or exports.

S. S. Brown vs. Houston, Tax Collector, 843.

6. The laws, in existence at the time of the adoption of the Constitution of 1868, and by which all the property of the Poydras Orphan Asylum where exempted from municipal taxation, without discrimination, were not repealed or affected by Article 118 of the same Constitution, which provided that "the General Assembly shall have power to exempt from taxation property *actually used* for church, school or charitable purposes."

Nor did any subsequent legislation repeal, amend or affect the said laws.

TAXES—Continued.

All the property of the Poydras Orphan Asylum is, therefore, still exempt from municipal taxation, whether yielding an income, or simply used for the purposes of an asylum.

Rules for the interpretation of Constitutions and Statutes.

City of New Orleans vs. Poydras Orphan Asylum, 850.

7. Under and by virtue of the Constitutional Ordinance of 1879 and Act No. 49 of the Legislature of 1880, the interest, as well as principal, of the taxes due the City of New Orleans prior to the first of January, 1879, may be paid in scrips or other proper evidences of indebtedness of said municipal corporation.

But the judicial costs incurred in proceedings against the delinquents, are not included in the relief law, and must be paid in cash.

City of New Orleans vs. Mrs. W. L. Jackson, 1038.

8. A judgment creditor of a municipal Corporation is not entitled to a Mandamus to compel the assessment and levy of a tax to pay his claim, when a tax, sufficient to that effect, has already been assessed and levied, but has not been fully collected. 31 An, 709.

Huey & Wise vs. Police Jury &c., 1019.

9. The Relator, having a judgment against the Parish of St. Martin for certain warrants, drawn under a Resolution of its Police Jury that they should be paid from the taxes of the years 1865, 1866, 1867 and 1868, seeks by Mandamus to compel said Parish to levy now a sufficient tax, according to the rolls of the current year, to pay said judgment. *Held* that the Relators right is limited to the terms and conditions under which the warrants were issued, and that he is not entitled to the levy of the tax prayed for.

The State ex rel. Nelson vs. Police Jury, &c., 1122.

10. Lands held indivision by several parties must be assessed as a whole in the names of all the joint owners and for the non-payment of taxes, must be seized and advertised for sale also as a whole, in proceedings directed against all the joint owners.

D. Hayes, Administrator, vs. Viator, Sheriff, et al., 1162.

11. The City of Shreveport by its Charter can only levy taxes for the ensuing year, after having made and published a budget of its contingent expenditures for said ensuing year. The debt sued upon in this case having been contracted by the City of Shreveport under the existence of its Charter, the Relatrix is not entitled to a Mandamus to compel the levy of a tax in any other manner or at any other time than as provided for in said Charter.

The State ex rel. Emily E. Griffin vs. City of Shreveport, 1179.

TAX SALE.

1. In a suit by a mortgage creditor to have a tax sale decreed null and void, and to have the property purchased from the tax collec-

TAX SALE—Continued.

tor, seized and sold in satisfaction of the mortgage, the purchaser sought to be evicted occupies the position of defendant in a petitory action, and has the right to show any and all titles under which he holds the property.

The question of the hypothecary rights of plaintiff against third persons, in such a suit, is prematurely presented and should be the object of another action.

A suit in nullity of a tax sale is only prescribed in three years from the date of the sale.

A tax sale may validly be made by a deputy of the tax collector.

The written notice to the owner or his agent, prescribed by Act No. 47 of 1873, is an essential prerequisite of the tax sale, and, in its default, the sale is null and void.

That informality may be taken advantage of by a mortgage creditor.

Marguerite Villey vs. Louis Jarreau et al., 291.

2. The right of redemption of property sold at a tax sale, given by law to the creditors of the former owner, is not confined to mortgage creditors.

When the tender is made according to law to the purchaser at the tax sale, for the purpose of redemption, his title, inchoate so far, is defeated, whether he accepts or improperly refuses the tender. From that time, a creditor of the former owner has the right to seize the property.

Miguel Basso vs. Blenker, Sheriff, et al., 432.

3. The well established rule of law, that the validity of a tax sale cannot be attacked collaterally, but only in a direct suit, does not apply to a petitory action, in which the defendant alleges the tax sale as his title. There, the plaintiff has the right to show the illegality of the title opposed to him, though it be a tax sale *prima facie* valid.

In such a case, all matters of defense set up in answer must be considered as open to every objection of law and fact, as if such objections had been specially pleaded.

T. J. Hickman et al. vs. Mary P. Dawson and Husband et al., 438.

4. When property, at the sale of the tax collector, was bid in for the State, and afterwards was redeemed by a mortgage creditor, by payment of the taxes for the amount of which it was adjudicated to the State, the owner, from whom the mortgage creditor claims back the redemption money, is not allowed to contest the original legality of the taxes.

The Ordinance of the Convention of 1879, for the relief of the delinquent tax payers, affords no assistance in that respect, to the party whose property has been redeemed as aforesaid.

Harvey Shannon vs. Mrs. Hannah Lane and Husband, 489.

TAX SALE—Continued.

5. An assessment of property in the name of L. H. Stafford or of L. A. Stafford is not an assessment in the name of the *owner*, when L. H. Stafford never was owner, and when L. A. Stafford had been dead for ten years; when the property had been vested in his succession, and when that fact had been formally notified to the proper officers and was ascertainable from the archives of their own offices.
A notice of the tax collector addressed to "B. S. Lee, agent of L. H. Stafford," is not a notice to the Succession of L. A. Stafford or to an agent of said succession.
A seizure of property as "the property of L. A. Stafford," is no seizure as against the Succession of L. A. Stafford; and the recording of such seizure is not the recording of a seizure against said succession.
A sale of property, belonging to the Succession of L. A. Stafford, as the property of L. A. Stafford, and for taxes due by L. A. Stafford as owner, is inoperative against said succession.
A transfer of the right, title and interest of L. A. Stafford in property, ten years after his death, operates no divestiture of the title of his succession.
The Plaintiff in this case was under no necessity to tender to Defendants the amount of taxes, costs, etc., for which the property was sold, as a condition precedent of his right of action. *Guidry vs. Broussard*, 32 An. 924, affirmed.
Defendants are not entitled to recover from Plaintiff the collector's fees, damages and costs of advertising, paid by them as part of the price of sale, because the property was not legally assessed, and Plaintiff was, therefore, not in default.
Geo. A. Stafford, Executor, vs. H. M. Twitchell et al., 520.
6. The notice to be given by the tax collector to the owner or agent and the return to be made by the latter, in assessment proceedings, are acts required to be done but once, and when once validly performed, have their full effect without regard to the subsequent changes of ownership. Therefore, if the owner dies after said notice and return, it is proper for the assessors to put on the rolls, instead of his name, that of his succession.
The former owner of property, sold by the tax collector, cannot complain of the insufficiency of the description of the property in the advertisement of sale, when the defective description is that given by the owner himself or his agent, in his return to the assessors. And parties, whose title is purely derivative from said former owner, have no better right to raise the objection.
A tax sale, like other judicial sales, when enjoined for only part of the property seized and advertised to be sold, is valid as to the portion which is not enjoined.

TAX SALE—Continued.

There is no force in plaintiffs' objection that the sale is invalid, because only consummated after the day the taxes passed into the list of delinquents, though the proceedings for the sale had been initiated long prior to that date.

M. Ada Lane and Husband vs. Succession of J. F. March et al., 554.

7. The purchaser at a tax sale, which is decreed null and void, is entitled to recover from the owner of the property such portion of the price of adjudication as went to the payment of taxes, but not the amount of the costs, penalties and interest. 33 An. 521.

A. H. Hopkins et al. vs. Succession of Mrs. M. Daunoy, 1423.

TRADE-MARK.

1. The infringer of a trade-mark cannot justify his wrongful act by showing that the plaintiff has violated some general law of the state not affecting his right to have a trade-mark, but on a different subject.

In the United States, trade-marks may be patented, and when the word *patented* is put on the label of the article sold, though the merchandise itself is not patented, but the word is used in reference to the trade-mark and not for the purpose of deceiving the public, the owner of the trade-mark will not be disentitled.

The words "Insurance Oil" are a legal trade-mark.

A trade-mark is not necessarily defective because it does not indicate the origin or ownership of the article.

The seller is as much entitled to protection in his trade-mark when his goods are manufactured by others under his orders and directions, as when he is himself the manufacturer.

Insurance Oil Company vs. John H. Scott, 946.

USUFRUCT.

1. A testator has made his will in the following words, viz: "It is my will and desire that my debts be paid and that my estate be distributed among my legal heirs, according to the laws now in force in Louisiana."

He left at his death a widow in community and three children.

Has he, by such a will, disposed of his share of the Community property and thereby deprived his widow of the usufruct of the same?

Decided affirmatively.

Succession of John B. Schiller, 1.

2. The husband in this case, having by his wife's last will the usufruct of her share of the Community, and, whilst acting as her Executor, having sold for Confederate money cotton belonging to the Community, is held to have sold it as usufructuary and not as Executor, and to be liable for its value.

Succession of Sarah E. Hayes, 1143.

USUFRUCT—Continued.

3. At the expiration of the usufruct, whether by death of the usufructuary or by judgment of Court for abuse, leases and mortgages placed upon the property by the usufructuary cease to have any effect.

V. H. Dickson and husband vs. H. J. Dickson, et als., 1370.

WILL.

1. The controversy is on the proof of an olographic will, between the universal legatee and the heirs at law. The lower Court gave judgment against the legatee for want of legal proof of the will, decreeing that *that there was no olographic will of the deceased.*

Held that the proof was insufficient, but that the judgment should have been one of non-suit only, as the legatee may still discover and produce proper evidence of the will.

Succession of Adrien Lopez, 368.

WRIT OF ERROR FROM U. S. SUPREME COURT.

1. The writ of Error from the Supreme Court of the United States, was necessarily issued in the premises *after* the judgment of this Court had become final and definitive and produced its legal effect. Such writ of Error could not, therefore, act as a *supersedeas*, which, under the legislation of Congress and jurisprudence of the U. S. Supreme Court, is not intended to interfere with the judgment of a State Court when the latter has already received its execution, or, as in the instant case, has produced its effect.

The State ex rel. Pugh, Coroner, vs. Judge, &c., 1381.

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